Supreme Court, U. S.
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No. 80- 229

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES J. SELLERS, JR., and
CHARLES J. SELLERS AND CO., INC.,

Petitioners,

—against—

PHILIP D. RUPERT, JR., and
RUPERT & LUTZ AGENCY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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Questions Presented

The basic issue presented by this case is whether the constitutional limitations on the law of libel enunciated in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), apply to libel suits brought against defendants who are not members of the media. This issue arises in context of several distinct questions:

1. The state courts awarded $200,000 in presumed or general libel damages to the individual plaintiff and $208,000 in libel damages to the corporate plaintiff. Do these awards violate the First and Fourteenth Amendments because (a) as the state court found, the individual plaintiff suffered no "actual personal damages," and (b) the damages allegedly sustained by the corporation were not caused by the alleged libel?

2. The trial court instructed the jury that it could return a verdict for the plaintiffs without finding that the defendants acted with fault as to the truth or falsity of their statements. Did the state courts thus impose "liability without fault," *id.*, at 347, in violation of the First and Fourteenth Amendments?

3. Did the state courts deprive petitioners of their First and Fourteenth Amendment rights by permitting liability to be imposed on the basis of constitutionally protected statements of opinion?

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Opinions Below

The memorandum decision of New York Court of Appeals is not yet reported. It is reprinted in the Appendix at A1-A2. The opinions of the New York Supreme Court, Appellate Division, Fourth Department, are reported at 65 A.D.2d 473, 411 N.Y.S.2d 75, and are reprinted in the Appendix at A3-A25.

Jurisdiction

The decision of the New York Court of Appeals sought to be reviewed was made and entered on June 5, 1980. (A1) This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Constitutional Provisions Involved

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Statement of the Case

Petitioners, Charles J. Sellers, Jr., and his insurance agency, Charles J. Sellers & Co., Inc., seek certiorari to review one of the largest libel judgments in New York history. That judgment, we submit, cannot stand if the constitutional limitations on the law of libel laid down in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), apply in libel suits against non-media defendants. That is an im-

portant issue not yet decided by this Court as to which there is a conflict among state and lower federal courts.

The Facts

At the time of the events at issue, plaintiff Rupert & Lutz Agency, Inc. was the administrator of the group disability insurance program endorsed by the Monroe County Medical Society. Charles J. Sellers & Co. was a competitor, and it was well known to the Medical Society because it too had dealings with the Society and its members.

In December 1970, Rupert & Lutz made a rather complex proposal to the Society concerning its group disability plan. The Society asked Mr. Sellers for his comments and Mr. Sellers gave them. Over the next few months, the Society, in its efforts to decide what to do about the proposal, was in frequent contact with Rupert & Lutz, with Mr. Sellers and, ultimately, with the insurance company that both agencies represented.

The crux of this case is plaintiffs' claim that Mr. Sellers' letter to the Society of March 10, 1971 was defamatory and caused the Society to transfer its business from Rupert & Lutz to Sellers & Co.[1] The letter, which was written in response to a request by the Society that Mr. Sellers comment on the correspondence that had been exchanged between the Society, Rupert & Lutz and the insurance company, contained Mr. Sellers' blunt and unflattering opinions with respect to the manner in which Rupert & Lutz had dealt with the Society. Among other things, he characterized Rupert & Lutz' efforts to get the Society to adopt its December 1970 proposal as "threats," referred to "misstatements" by Rupert & Lutz, and characterized its activities

[1] The letter, with the allegedly defamatory portions italicized, is reprinted in the Appendix at A35-A38.

as "blunders." But while his opinions were candidly stated, the events on which he based those opinions were fully known to the Medical Society, which was in as good a position as Mr. Sellers to judge for itself whether the characterizations were appropriate.

Coincidentally, the Medical Society had decided that it had had enough of Rupert & Lutz before it ever saw Mr. Sellers' letter. On March 10, 1971—the same day on which Mr. Sellers wrote his letter—Dr. Hamilton, the chairman of the Society's Economics Committee, recommended that Rupert & Lutz be terminated and that Sellers & Co. be engaged to replace it. There was no evidence whatever that Dr. Hamilton or anyone else at the Medical Society had received or heard of Mr. Sellers' letter at that time or that the letter had any bearing on the decision to replace Rupert & Lutz.[2]

Rupert & Lutz and its principal, Philip D. Rupert, Jr., brought this action for libel based on the March 10, 1971 letter and for interference with advantageous economic relations.

Proceedings Below

1. *Trial.* This action was tried in the New York Supreme Court, Monroe County, in 1977. The crux of the defense were the contentions (a) that the March 10, 1971 letter, if it was defamatory at all, contained only statements of opinion that could not constitutionally form the basis for a libel judgment, and (b) that the letter caused no injury to the plaintiffs.

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[2] The board of directors of the Medical Society ratified Dr. Hamilton's recommendation later in March 1971, but there was no evidence that any of its members received the letter, and there was no evidence that the letter influenced it in any way.

At the close of all the evidence, petitioners moved for a directed verdict as to liability on the ground that the March 10, 1971 letter, insofar as it was alleged to be defamatory, contained only constitutionally protected statements of opinion. (*See* A88) They also sought a directed verdict as to Mr. Rupert's general damages claim on the ground that "there is no evidence of any damage to the Plaintiff, Philip D. Rupert, Jr., alleged or shown . . ." (A89) The motions were denied.

In further pursuit of their opinion defense, petitioners requested that the jury be charged, in accordance with Section 566 of the RESTATEMENT (SECOND) TORTS, which is based explicitly on *Gertz,* that opinions based on facts known by or disclosed to the recipient of an alleged libel may not form the basis for a libel judgment. (A103-04, A106) That instruction was refused, and petitioners took timely exception to the refusal so to charge. (A74)

The court's instruction on liability, which was similar to that requested by petitioners' trial counsel, was a traditional common law charge. It did not require the jury to find fault in accordance with *Gertz* as a prerequisite to liability. (A41-42) Petitioners' trial counsel did not object to that aspect of the charge.

The jury returned verdicts, insofar as relevant here, as follows:

LIBEL COUNT

For Philip D. Rupert, Jr.	
General damages	$200,000
Punitive damages	1
For Rupert & Lutz Agency, Inc.	
Special damages	$208,000
General damages	1
Punitive damages	1

INTERFERENCE WITH ADVANTAGEOUS RELATIONS COUNT

For Philip D. Rupert, Jr.	
Punitive damages	1
For Rupert & Lutz Agency, Inc.	
Punitive damages	15,000
Compensatory damages	1
Total	$423,005

After the verdicts, petitioners moved unsuccessfully for judgment notwithstanding the verdict as to all of the libel awards. The motion asserted first that there was no evidence of any damage to Rupert. (A91-92) It contended also that there was no evidence of any damage to Rupert & Lutz proximately caused by the allegedly defamatory letter. (A92-93) And it reasserted the opinion contention. (A93) In the alternative, petitioners sought a new trial on the ground that the refusal to charge the jury on opinion was erroneous. (A97) That relief was denied as well.

2. *The Appellate Division.* Petitioners appealed to the Appellate Division, Fourth Department, of the New York Supreme Court. They there presented each of the questions raised here.

a. Petitioners sought reversal of the libel award to Rupert personally. They contended that *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), applies to this case and requested that the $200,000 general damages award to Rupert be set aside because there was no evidence of actual injury to him. Similarly, petitioners argued that the award of $208,000 special damages to Rupert & Lutz was prohibited by *Gertz* because there was no evidence that the loss of the Medical Society account was caused by the March 10 letter, the sole basis for the libel count.

The Appellate Division affirmed both damage awards, although it found that there was no evidence of any "actual personal damages" to Rupert personally. (A21)

The majority did not explain the basis for its action, although it appears to have affirmed the general damages award because it believed that *Gertz* applies only in media cases. (A4-A5)

The concurring justice thought that *Gertz* does apply to non-media defendants, and he recognized that *Gertz* bars recovery of general or presumed damages, at least absent a finding that defendants acted with knowledge of falsity or in reckless disregard of the truth. But he concurred in the affirmance of the general damage award, apparently because he concluded that the jury's verdict of $1 in punitive damages indicated a finding that petitioners acted with reckless disregard for the truth.[3] (A14-A16)

Neither the majority nor the concurring justice addressed petitioners' contention that the special damage award was improper because the March 10 letter did not cause Rupert & Lutz to lose the Medical Society account.

b. Petitioners urged also that the failure of the trial court to charge the jury on liability for defamation consistent with the fault requirement of *Gertz* violated the First and Fourteenth Amendments. Recognizing that their trial counsel had failed to except to the charge on this ground, they contended *inter alia* that the Appellate Division should have exercised its discretion under state law to review the charge notwithstanding the lack of exception

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[3] The concurring justice was wrong. The common law punitive damage instruction permitted the jury to award punitive damages solely on finding ill will or reckless disregard of the truth. (A44-A46, A67) Since there was a general verdict, it is impossible to tell whether the jury found reckless disregard. *E.g., Greenbelt Coop. Pub. Ass'n* v. *Bresler,* 398 U.S. 6, 9-11 (1970).

or, alternatively, that the lack of any exception could not bar review of a claimed constitutional deficiency in the charge because petitioners did not knowingly waive their right to a proper charge.[4] The Appellate Division declined to review the charge due to the lack of a proper exception at trial. (A3-A4)

c. Petitioners contended also that the March 10, 1971 letter, the only basis for the libel claim, contained only Mr. Sellers' constitutionally protected statements of opinion. Thus, petitioners argued that they were entitled to judgment on the libel claim under *Gertz* as a matter of constitutional law. (A12)

Alternatively, petitioners argued that the refusal of the trial judge to give the requested charge regarding opinions violated petitioners' First and Fourteenth Amendment rights. (A12) Petitioners contended that the presence of even one constitutionally protected opinion in an allegedly libelous statement necessitates a proper jury instruction on opinion in order to preclude liability being imposed, even in part, on the basis of protected opinion.

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[4] The Appellate Division of the New York Supreme Court has discretion to review fundamental errors in jury instructions despite the lack of any exception at trial. *Martin* v. *City of Cohoes*, 37 N.Y.2d 162, 165, 371 N.Y.S.2d 687, 690 (1975); *DiGrazia* v. *Castronova*, 48 A.D.2d 249, 251-52, 368 N.Y.S.2d 898, 901-03 (1975). *Kazales* v. *Minto Leasing, Inc.*, 61 A.D.2d 1039, 1040, 403 N.Y.S.2d 296, 288-89 (1978). That power is exercised frequently. *E.g.*, *DiGrazia, supra*, 48 A.D.2d at 251-52, 368 N.Y.S.2d at 901-03; *Estes* v. *Town of Big Flats*, 41 A.D.2d 681, 340 N.Y.S.2d 950 (1973); *Shapiro* v. *Art Craft Strauss Sign Corp.*, 39 A.D.2d 696, 332 N.Y.S. 2d 588 (1972); *Doyle* v. *Streifer*, 34 A.D.2d 183, 310 N.Y.S.2d 165 (1970); *Rivera* v. *W.&R. Service Station, Inc.*, 34 A.D.2d 115, 309 N.Y.S.2d 274 (1970); *Clark* v. *Donovan*, 34 A.D.2d 1099, 312 N.Y.S.2d 610 (1970), *appeal dismissed*, 31 N.Y.2d 661, 336 N.Y.S. 2d 897 (1972); *Hicks* v. *Demascole*, 25 A.D.2d 487, 266 N.Y.S.2d 959 (1966); *DeJoseph* v. *Gutekunst*, 13 A.D.2d 223, 215 N.Y.S.2d 208 (1961).

The Appellate Division described the March 10, 1971 letter as a "mixture of opinion and fact" and stated that "the letter was not constitutionally protected as a statement of opinion *only* . . ." (A17) (emphasis added) It therefore rejected petitioners' contention that they were entitled to dismissal on that ground. Although it recognized that the letter contained at least some opinions, the court implicitly held that no instruction on opinion was required.

3. *The Court of Appeals.* Each of the contentions presented in this Court was presented to the New York Court of Appeals. (A26-A32)[5] The Court of Appeals' brief memorandum states in pertinent part:

> "The order of the Appellate Division should be affirmed, without costs.
>
> "Defendant's claim concerning the propriety of the charge to the jury is not preserved for review (CPLR 4110[b]), as defendant not only failed to object to the court's instruction, but in fact requested a charge which was substantially the same as the one rendered. Nor can it be said, as a matter of law, that the verdict of the jury, under the instructions given, is unsupported by the record. *Defendant's remaining contentions have been examined and found to lack substantial merit.*" (A1-2 (emphasis added).

Because the Court of Appeals thus passed on the merits of petitioners' constitutional contentions, save their objection to the charge on liability, this Court has jurisdiction over

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[5] Petitioners' motion for leave to appeal to the New York Court of Appeals, relevant parts of which are reprinted in the Appendix at A26-A34, demonstrates that each of the constitutional issues presented here was raised in the state court. Petitioners also will lodge with the Clerk a set of the briefs filed in the State Court of Appeals.

each of those questions.[6] We show below that the Court also has jurisdiction over petitioners' claim that the charge on liability did not comport with the First and Fourteenth Amendment. *Infra,* note 16.

Reasons for Granting the Writ

I

THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT AND FEDERAL COURTS OF APPEALS, WHICH HAVE HELD OR INDICATED THAT *Gertz* APPLIES TO NON-MEDIA DEFENDANTS

As the concurring justice in the Appellate Division observed, *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974), "cut a wide swathe uprooting and eliminating some concepts deeply imbedded in the law of libel." (A14) It held that the Constitution ordinarily limits libel plaintiffs to recovery of "compensation for actual injury . . . supported by competent evidence . . ." *Id.,* at 349-50. It held that the states may "not impose liability without fault" as to truth or falsity. *Id.,* at 347. And it stated that "there is no such thing as a false idea," *id.,* at 339, thus spawning a substantial body of case law holding that opinions are constitutionally protected and may not form the basis for a libel award.[7]

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[6] *E.g., Payton* v. *New York,* 100 S. Ct. 1371, 1378 n.19 (1980); *Jenkins v. Georgia,* 418 U.S. 153, 157 (1974); *Raley* v. *Ohio,* 360 U.S. 423, 436 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it."); *Whitney* v. *California,* 274 U.S. 357, 360-62 (1927); STERN & GRESSMAN, SUPREME COURT PRACTICE § 3.28 (5th ed. 1978).

[7] *E.g., Orr* v. *Argus-Press Co.,* 586 F.2d 1108, 1114-15 (6th Cir. 1978), *cert. denied,* 440 U.S. 960 (1979); *Buckley* v. *Littell,* 539 F.2d 882, 893 (2d Cir. 1976), *cert. denied,* 429 U.S. 1062 (1977); *Rinaldi* v. *Holt, Rinehart & Winston, Inc.,* 42 N.Y.2d 369, 380, 397 N.Y.S.2d 943, 950, *cert. denied,* 434 U.S. 969 (1977); RESTATEMENT (SECOND) TORTS § 566 (1977).

Gertz, however, has spawned a sharp conflict as to whether its holdings apply in all libel suits, or only in suits against the press and the media. Although it wrote no opinion, the New York Court of Appeals necessarily held below that *Gertz* does not apply in this purely private libel suit. Three other states have taken the same position.[8] On the other hand, several states,[9] one federal court of appeals,[10] the RESTATEMENT OF TORTS,[11] and the great weight of scholarly authority [12] either have held or assumed that

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[8] *Rowe* v. *Metz,* 195 Colo. 424, 579 P.2d 83 (1978) (at least in cases of defamation per se); *Harley-Davidson Motorsports, Inc.* v. *Markley,* 279 Or. 361, 568 P.2d 1359 (1977); *Calero* v. *Del Chemical Corp.,* 68 Wis.2d 487, 228 N.W.2d 737 (1975); *see also Cahill* v. *Hawaiian Paradise Park Corp.,* 56 Hawaii 522, 543 P.2d 1356 (1975); *Foster* v. *Laredo Newspapers, Inc.,* 541 S.W.2d 809 (Tex. 1976), *cert. denied,* 429 U.S. 1123 (1977); *Mid-America Food Service, Inc.* v. *ARA Services, Inc.,* 578 F.2d 691, 697, n.5 (8th Cir. 1978); *Littlefield* v. *Fort Dodge Messenger,* 614 F.2d 581, 582 (8th Cir.), *cert. denied,* 100 S.Ct. 1342 (1980).

[9] *Bryan* v. *Brown,* —— Ala. ——, 339 So.2d 577 (1976), *cert. denied,* 431 U.S. 954 (1977) (holding); *Jacron Sales Co.* v. *Sindorf,* 276 Md. 580, 350 A.2d 688 (1976) (holding); *Hames* v. *Anderson,* 571 P.2d 831 (Okla. 1977) (assumes *Gertz* applies); *Nelson* v. *Cail,* 120 Ariz. 64, 583 P.2d 1384 (Ariz. App. 1978) (holding); *Millsaps* v. *Bankers Life Co.,* 35 Ill. App. 3d 735, 342 N.E.2d 329 (1976) (holding); *Patten* v. *Smith,* 360 N.E.2d 233 (Ind. App. 1977) (assumes *Gertz* applies); *Rogozinski* v. *Airstream via Angell,* 152 N.J. Super. 133, 377 A.2d 807 (Law Div. 1977) (assumes same rule applies in media and non-media cases), *aff'd* 164 N.J. Super. 465, 397 A.2d 334 (App. Div. 1979); *Ryder Truck Rentals, Inc.* v. *Latham,* 593 S.W.2d 334 (Tex. Civ. App. 1979) (holding).

[10] *Maheu* v. *Hughes Tool Co.,* 569 F.2d 459, 477 (9th Cir. 1977) (applying *Gertz*'s requirement of competent evidence of actual damages to an award against a non-media defendant).

[11] RESTATEMENT (SECOND) TORTS §§ 580B and comment e and § 621 comment b (1977).

[12] Collins & Drushal, *The Reaction of the State Courts to Gertz* v. *Robert Welch, Inc.,* 28 CASE W. RES. L. REV. 306, 328-35 (1978). *See, e.g.,* TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-13, 639 n.6 (1978); Keeton, *Defamation and Freedom of the Press,* 54 TEX. L.

(footnote continued on following page)

Gertz applies in all libel suits, irrespective of whether the defendant is a member of the media. In many states that have not yet confronted the question directly, dicta, or the application of the *Gertz* rule without relying on the presence of a media defendant, indicate that *Gertz* will be applied to media and non-media defendants alike.[13] The severity of this conflict is well illustrated by the Oregon Supreme Court's explicit rejection of the reasoning of the Maryland Court of Appeals in *Jacron, supra* note 9, in which the Maryland court held that *Gertz* applies in all libel suits. *Harley-Davidson Motorsports, Inc.* v. *Markley, supra* note 8.

The question whether *Gertz* applies in libel suits against non-media defendants is vitally important. As this Court has recognized, the free interchange of ideas and information that the First Amendment is intended to protect does not extend only to political issues and public debate. Society also has "a strong interest in the free flow of commercial information." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976). Indeed, the "consumer's interest in the free flow of commercial information . . . may be as keen, if not

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(footnote continued from preceding page)

REV. 1221, 1237 (1976); Anderson, *Libel and Press Censorship*, 53 TEX. L. REV. 422, 442-43 & n.95 (1975); Eaton, *The American Law of Defamation Through Gertz* v. *Robert Welch and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1404-06, 1416-18 (1975); Frakt, *The Evolving Law of Defamation: New York Times Co.* v. *Sullivan to Gertz* v. *Robert Welch, Inc. and Beyond*, 6 RUT.-CAM. L. J. 471, 509-12 (1975).

[13] *Peagler* v. *Phoenix Newspapers, Inc.*, 114 Ariz. 309, 560 P.2d 1216, 1222 (1977); *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N.E.2d 161, 168 & n.6 (1975); *Thomas H. Maloney & Sons, Inc.* v. *E.W. Scripps Co.*, 43 Ohio App.2d 105, 334 N.E.2d 494 (1974), *cert. denied*, 423 U.S. 883 (1975); *Taskett* v. *King Broadcasting Co.*, 86 Wash.2d 439, 546 P.2d 81 (1976).

keener by far, than his interest in the day's most urgent political debate." *Id.* at 763. This case illustrates the point vividly. The Monroe County Medical Society surely had a compelling interest in obtaining advice concerning its disability insurance program free of inhibitions caused by the threat of libel suits against Mr. Sellers or, for that matter, any other advisor. Thus, the question whether *Gertz* applies to libel suits brought against non-media defendants is one of substantial importance that should be resolved by this Court.

This is an appropriate and, indeed, unusually useful case in which to resolve this question, as well as the conflict among the lower courts.

First, the question of *Gertz*'s applicability to cases involving non-media defendants is squarely raised by the New York Court of Appeals' holding that the award of $200,000 in general damages to Rupert personally did not offend the Constitution. Because the Appellate Division explicitly concluded that there was no evidence of any "actual personal damages" to Rupert (A20-21), the $200,000 award to him must stand or fall on the question whether *Gertz*'s restriction of libel plaintiffs to "compensation for actual injury" applies here.[14] And the Appellate Division's finding makes this case a uniquely attractive vehicle for addressing this question because it eliminates any need to review a lengthy trial record to determine whether the damage award was supported by competent evidence.

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[14] The $208,000 award to Rupert & Lutz raises precisely the same issue. Since the award represented the value of the loss of the Medical Society account, and the record unequivocally shows that the March 10, 1971 letter did not cause the loss of the account, the award is not "compensation for actual injury . . . inflicted by defamatory falsehood . . . ." *Gertz, supra,* 418 U.S. at 349-50.

Second, the charge to the jury plainly did not require a finding of fault as a prerequisite to liability.[15] If *Gertz* applies here, the charge was patently erroneous.[16]

Finally, this case furnishes an opportunity to deal with all three aspects of *Gertz*—the damages limitation, the fault requirement and the opinion question—in the non-media context.

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[15] The trial court instructed the jury in pertinent part: "If you find that the letter of the defendants as understood by those who received it, and read it, did disgrace the plaintiffs' reputation, or discredit them in the community, your verdict will be for the plaintiffs. * * * Defendant contends that the written statement it is charged with make it in fact true. * * * If you find that the statement differed in substantial respect from the truth your finding will be for the plaintiff on this issue." (A41-A42)

[16] The propriety of the charge to the jury on liability is before this Court despite the refusal of the New York appellate courts to decide the issue because petitioners' trial counsel failed to except to it.

Where the state courts have discretion to consider a federal claim, despite a failure to comply with state procedural requirements, but decline to do so, this Court may consider the federal claim. As MR. JUSTICE FRANKFURTER, speaking for the Court, said in *Williams* v. *Georgia,* 349 U.S. 375, 383 (1955): "[W]here a State allows questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right. A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner." (footnote omitted). *See also Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 299, 231-34 (1969).

The New York Appellate Division had the power to review the charge, *supra* note 4, but declined to exercise its discretion to do so. Hence, this case comes under *Williams* v. *Georgia, supra,* 349 U.S. 375. The propriety of the charge on liability is open to review in this Court.

The error in the charge is open to review here for another reason. Since petitioners contend that the charge violated the First and Fourteenth Amendments, and petitioners did not knowingly and intelligently waive their right to a proper charge, this Court's decisions in *Curtis Pub. Co.* v. *Butts,* 388 U.S. 130, 142-45 (1967), and *Henry* v. *Mississippi,* 379 U.S. 443 (1965), demonstrate that this Court may review the jury instructions.

This Court therefore should grant certiorari to determine whether *Gertz* applies in libel suits against non-media defendants.

II

CERTIORARI SHOULD BE GRANTED TO DETERMINE THE TYPES OF STATEMENTS THAT ARE CONSTITUTIONALLY PROTECTED EXPRESSIONS OF OPINION AND BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

This Court stated in *Gertz* that:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." 418 U.S. at 339-40.

Several federal and state courts, as well as the American Law Institute, therefore have read *Gertz* as holding that the First and Fourteenth Amendments bar imposition of liability for defamation where the statements at issue are statements of opinion, at least where the facts upon which the opinion is based are known by or disclosed to the audience.[17]

The March 10, 1971 letter contained Mr. Sellers' opinions and characterizations of Rupert & Lutz' conduct. Indeed, the recipient of the letter testified that it seemed to him to be merely Mr. Sellers' opinions.

Petitioners argued that the March 10 letter, if it was defamatory at all, contained only opinions that could not

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[17] *Supra* note 7.

be deemed libelous as a matter of law. They unsuccessfully sought both a directed verdict and judgment n.o.v. on that ground. Petitioners asked also that the jury be instructed that opinions could not be the basis for liability in defamation and took proper exception to the trial court's refusal to instruct the jury on the opinion issue.

The decision below raises two important issues regarding constitutionally protected opinion.

1. The court below necessarily rejected defendants' contention that the letter contained only opinions that are constitutionally protected. In doing so, it widened the conflict among lower courts as to the types of statements that are constitutionally protected opinions. Here, the portions of Mr. Sellers' letter that were complained of included characterizations of Rupert & Lutz' actions as "threats and bluffs" and a "parade of blunders". (A37) In *Orr* v. *Argus-Press Co., supra,* 586 F.2d 1108, on the other hand, the Sixth Circuit held that a characterization of an indictment for violation of a state blue sky law as charging "fraud" was constitutionally protected opinion. In *Rand* v. *New York Times Co.,* 184 (27) N.Y.L.J., Aug. 7, 1980, p.1, col. 6, the Appellate Division of the New York Supreme Court held that a statement that the plaintiff, a business manager, had "f — — d over" or "screwed" his client "is classically pure opinion" and could not provide the basis for a libel suit. Indeed, in *Greenbelt Cooperative Publishing Ass'n* v. *Bresler,* 398 U.S. 6, 13-15 (1970), a pre-*Gertz* decision, this Court held that an imputation that the plaintiff had engaged in "blackmail" was merely rhetoric that could not constitutionally provide a basis for a libel suit.

It is difficult to see why an accusation that one has engaged in "fraud" or "blackmail", or that a business manager has "screwed" his client, is constitutionally protected opin-

ion while a statement that a competing insurance broker had "blundered" is not, as the court below implicitly held. The question, moreover, is of substantial public importance. For the effect of the decision below is to chill the willingness of businessmen and professionals to express opinions regarding the conduct and advice of their competitors. The First Amendment, as we have shown, is designed to protect the rendition of such advice as well as political speech. In consequence, this Court should grant certiorari in order to harmonize the conflicting, or at least divergent, views of lower courts as to the types of statements that are constitutional protected expressions of opinion.

2. The Appellate Division concluded that "the letter was not constitutionally protected as a statement of opinion *only* . . ." (A17) (emphasis added). The Court of Appeals did not disagree with this view. Hence, the courts below concluded that at least some of the statements in the letter were opinions.

The jury returned a general verdict. As the trial court refused to charge the jury on the opinion issue, that verdict therefore may rest on statements that even the New York courts regarded as constitutionally protected opinion.

In these circumstances, the affirmance of the general verdict conflicts with decisions of this Court:

> "To say that a general verdict . . . should be upheld though we cannot know that it did not rest on the invalid constitutional ground . . . would be to countenance a procedure which would cause a serious impairment of constitutional rights." *Williams* v. *North Carolina*, 317 U.S. 287, 292 (1942).[18]

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[18] *Accord, e.g., Street* v. *New York*, 394 U.S. 576, 585-89 (1969); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 283-84 (1964); *Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931).

Thus, the presence of even one constitutionally protected opinion in an allegedly libelous statement necessitates a proper jury instruction on opinions. Since the trial court refused such an instruction, over timely exception, the decision affirming the general verdict of liability was improper.

Accordingly, this Court should grant the petition in order to delineate procedures for the submission of libel cases to juries where the alleged libel includes constitutionally protected opinion and to require compliance with decisions of this Court.

CONCLUSION

This case offers the Court a uniquely attractive opportunity to resolve the important conflict among state and federal courts as to whether the constitutional limitations on the law of defamation established in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), apply to libel suits against non-media defendants. It also would permit this Court to enunciate a standard for distinguishing between statements of fact and constitutionally protected statements of opinion in libel cases and to establish the procedure to be used in submitting libel cases to juries where the allegedly defamatory publication contains both statements of opinion and statements of fact. Accordingly, the petition for a writ of certiorari to the New York Court of Appeals should be granted.

Dated: August 1980

Respectfully submitted,

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APPENDIX

APPENDIX A

Decision of New York Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

No. 283

Philip D. Rupert, Jr., & ano.,

Appellants-Respondents,

v.

Charles J. Sellers, Jr., & ano.,

Respondents-Appellants.

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

(283) James M. Hartman, Rochester, for appellants.

Lewis A. Kaplan & Richard Kurnit, NYC, & Joseph L. Watson, Buffalo, for respondents.

MEMORANDUM:

The order of the Appellate Division should be affirmed, without costs.

Defendant's claim concerning the propriety of the charge to the jury is not preserved for review (CPLR 4110[b]), as defendant not only failed to object to the court's instruction, but in fact requested a charge which was substantially the same as the one rendered. Nor can it be said, as a matter of law, that the verdict of the jury, under the instructions given, is unsupported by the record. Defendant's remaining

contentions have been examined and found to lack substantial merit.

On plaintiff's cross appeal, we find no error in the disallowance of preverdict interest. It is a settled rule that preverdict interest is not obtainable as of right in a libel action (e.g., *Wilson* v *City of Troy*, 135 NY, 96, 105). Any change in this rule should be effected legislatively, and not judicially (see *Purcell* v *Long Is. Daily Press Pub. Co.*, 9 NY2d 255, 259).

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Order affirmed, without costs, in a memorandum. All concur. Gabrielli, J., taking no part.

Decided June 5, 1980

APPENDIX B

Appellate Division Opinions

PHILIP D. RUPERT, JR., et al., Respondents, v CHARLES J. SELLERS, JR., et al., Appellants.

Fourth Department December 15, 1978

APPEARANCES OF COUNSEL

Paul, Weiss, Rifkind, Wharton & Garrison (Lewis A. Kaplan and *Richard Kurnit* of counsel) and *Watson, McGarvey, Hetzelt & Bennett (Joseph L. Watson* of counsel), for appellants.

Harris, Beach, Wilcox, Rubin & Levey (James M. Hartman, Edward H. Fox and *Douglas S. Gates* of counsel), for respondents.

OPINION OF THE COURT

SIMONS, J.

The members of this court are unanimous in their opinion that the plaintiffs are entitled to recover in this action, and the opinion of Justice CARDAMONE ably sets forth our resolution of the several issues presented by the parties. Three of us, however, do not find it necessary to predicate our decision upon the Supreme Court's ruling that there may be no liability without fault in certain defamation actions as enunciated in *Gertz* v *Robert Welch, Inc.* (418 US 323). Indeed, for the reasons which follow we find it inappropriate to do so.

This action was tried two years after the Supreme Court decided *Gertz* and defense counsel in this case was familiar with it. Notwithstanding that earlier decision, counsel in

this case requested the court to charge the jury on the traditional common-law rules of libel per se and the court did so without further request or exception. The law as charged thus became the law of the case not open to review in this court. Defendants now urge, for the first time, that the trial court should have applied a fault standard. Obviously the action was not tried or submitted to the jury on that theory and we should not try now to sort out the evidence and isolate statements of the charge to fit the case within some unspecified and amorphous rule unsolicited at the time of trial.

Moreover, we disagree with Justice CARDAMONE's belief that *Gertz,* as implemented by the Court of Appeals decision in *Chapadeau* v. *Utica Observer-Dispatch* (38 NY2d 196), established a rule which binds us in this case and that there may be no liability in *any* defamation action without proof of fault. The court in *Gertz* held that the States "so long as they do not impose liability without fault * * * may define for themselves the appropriate standard of liability for a *publisher* or *broadcaster* of defamatory falsehood injurious to a private individual." (418 US 323, at p 347; emphasis added.) Responding to that decision New York's highest court decided in *Chapadeau* that in matters "arguably within the sphere of legitimate public concern," a plaintiff allegedly defamed could recover from a publisher or broadcaster but only upon a showing that defendant's conduct was grossly irresponsible (*Chapadeau* v. *Utica Observer-Dispatch, supra,* p 199).

Logically, it may be contended that these decisions should be extended because a private individual's right to free speech is no less valuable than that of a publisher or broadcaster and therefore it should be protected by similar standards of proof (see, e.g., Restatement, Torts 2d, § 580B). Neither the Supreme Court nor any New York

court, however, has required proof of fault before recovery is permitted in cases such as this which involve private communications by private individuals about private matters. It is particularly inappropriate for an intermediate appellate court to do so upon this record. The Court of Appeals stated well the dangers: "[I]n any defamation case it is perilous, and may be misleading, to generalize about rules unless their consideration is necessary to the disposition of the individual case. The hazard is both tempting and particularly to be eschewed when the applicable law, as in this field, is subject to fluctuating change, due in large measure to the struggles of modern courts in delineating the scope of First Amendment rights." (*Moran* v. *Hearst Corp.*, 40 NY2d 1071.)

It may be that some higher court will think that this case is a suitable vehicle to modify New York's common law of private defamation. Foreseeing that possibility, we exercise our power to review the facts (CPLR 5501, subd [c]; and see *Time, Inc.* v *Firestone,* 424 US 448) and find that there is evidence in the record sufficient to meet any predictable burden of proof, be it negligence, actual malice or some intermediate degree of fault.

CARDAMONE, J. (concurring). This is a libel suit between private individuals. With the several exceptions noted, we affirm the substantial jury verdicts awarded plaintiffs after a lengthy jury trial.

STATEMENT OF THE CASE

The plaintiffs are Philip D. Rupert, Jr. (Rupert) and Rupert & Lutz Agency, Inc. (Rupert & Lutz), an insurance agency of which Mr. Rupert is president. The defendants are Charles J. Sellers, Jr. (Sellers) and Charles J. Sellers & Company, Inc. (Sellers & Co.), an insurance agency of

which Mr. Sellers is president. The defendants appeal from a Monroe County Supreme Court verdict in favor of the plaintiffs, following a jury trial, and judgment in the amount of $575,842.53.

Rupert & Lutz was the administrator of the health and accident group plan of the Monroe County Medical Society (Medical Society), a voluntary organization of physicians offering insurance to its members at reduced group rates. Continental Insurance Company (Continental) was and is the carrier of the group health and accident insurance plan. In March, 1971 the Medical Society changed administrators, naming Sellers & Co. in place of Rupert & Lutz to serve as administrators of the group plan. This lawsuit alleging libel and tortious interference with a contractual relationship concerns the circumstances surrounding the switching of the indorsement by the Medical Society from Rupert & Lutz to Sellers & Company.

Plaintiffs originaly alleged six causes of action. Only two —the second and sixth—are the subject of this appeal, the others having been withdrawn, dismissed or no-caused. Plaintiffs' second cause of action claims that each was libeled in a March 10, 1971 letter from Charles J. Sellers to Donald M. Irish, then executive director of the Medical Society, but deceased at the time of the 1977 trial. Plaintiffs' sixth cause of action alleges that defendants Sellers and Sellers & Company commenced a systematic campaign to induce the Medical Society to terminate the society's written contractual relationship with plaintiffs. With respect to the second cause of action, the jury returned verdicts in favor of Rupert individually for $22,000 special damages and $200,000 general damages and in favor of Rupert & Lutz Agency for $208,000 special damages and $1 general damages. In the same cause of action the jury

further found that both plaintiffs were entitled to punitive damages. After hearing further proof on that issue, the jury returned a verdict for $1 punitive damages for Rupert and $1 punitive damages for Rupert & Lutz. With respect to the sixth cause of action, the jury rendered verdicts in favor of Rupert for $20,000 compensatory damages and for Rupert & Lutz in the amount of $1 compensatory damages. As to the sixth cause of action, the jury also found defendants liable for punitive damages in the amount of $1 for Rupert and $15,000 for Rupert & Lutz.

Rupert & Lutz had been the administrator of the Medical Society's group health and accident insurance program since 1945. Under the original plan doctors who were members of the Medical Society could enroll in a group disability plan cancelable at will by the insurance company. In 1968 Continental began offering a new, vastly different program the main feature of which was that it is guaranteed group renewable, that is, not cancelable at the option of the insurance company. Under the new program the older physician would be required to pay a substantially greater premium than under the old program. The younger physician, however, would pay substantially less. From 1968 to 1970 Rupert & Lutz conducted a voluntary conversion of the individual member doctors to the new program with most of the younger doctors converting and most of the older doctors electing to retain their existing coverage. Since the success of the individual voluntary conversion was mixed, the use of other alternatives such as voluntary or compulsory mass conversion was a distinct possibility. A voluntary mass conversion is a conversion of members on a mass basis with permission of the Medical Society, but without consent of the individual doctors. A compulsory mass conversion is accomplished when the insurance company unilaterally con-

verts the existing policies to the new program without either the members' or the Medical Society's permission. Such compulsory mass conversion is more likely where the loss ratio gets too high. The loss ratio for the Medical Society was 56% in 1968; 50% in 1969; and 80% in 1970. This change in the loss ratio was due in large measure to payments made under an extended benefit rider as many of the older doctors were reaching the age when they began to experience covered losses.

It was under these circumstances that Rupert & Lutz requested a meeting with the Medical Society held on December 11, 1970 to discuss, among other things, the loss ratio. Rupert & Lutz recommended to the society that it voluntarily mass convert all of the policies. No dissatisfaction was expressed by the society with Rupert & Lutz at the December 11, 1970 meeting, nor in a subsequent letter from the then executive director of the society (Mr. Irish) to plaintiff dated January 19, 1971. In fact, it was not until March 24, 1971 that plaintiff was aware of any dissatisfaction that the Medical Society had with the services being provided by plaintiffs. In the meantime, and unknown to plaintiffs, defendant Charles Sellers, had also attended that same December 11, 1970 meeting at his own request and was present at a time other than when plaintiffs were. He testified that several days after the meeting Mr. Irish called him and told him about the meeting with plaintiffs. This prompted an exchange of correspondence between them.

The first letter from Mr. Irish to Sellers whether Sellers had "any ideas who might be consultant" to impartially evaluate the society's alternatives. The letter asked Sellers to find someone with "no ax to grind" or "personal stake" in the matter. Mr. Sellers wrote a letter to the society dated December 28, 1970 explaining what plaintiffs' report of December 11, 1970 meant and suggested that he serve as

"consultant". In the December 28 letter, after stating that "personal interests" have never been a problem for his office, Mr. Sellers begins his impartial evaluation by characterizing some of plaintiffs' recommendations to the society as "dangerous" and predicted "disaster" if the Medical Society followed plaintiffs' advice. Mr. Sellers appeared in person before the medical economics committee of the society on February 9, 1971 and explained his comments made in his December 28, 1970 communication. He testified that the doctors "didn't really get angry until he had explained" the comments. Later Sellers wrote on February 11, 1971, characterizing plaintiffs' letter of February 10, 1971 as having stated that Continental had issued an "ultimatum" that the doctors must be converted or they would be canceled. The correspondence from Sellers to the society continued by letter dated February 22, 1971 in which Mr. Sellers accused plaintiffs of a conflict of interest and on February 24 in which Sellers stated that Rupert & Lutz "has operated without capable leadership and this group has deteriorated". Subsequently Mr. Sellers wrote to Continental along the same lines. The matter culminated in the Sellers' letter of March 10, 1971 to the society which is the crucial evidence upon which plaintiffs' claim for libel is based.

In that letter Sellers stated that Rupert will "reluctantly go through the motions of a voluntary installation of guaranteed renewable policies". He goes on to state that Rupert needs many things to win back all the young physicians: "[T]here are so many things he needs and doesn't have to do the job that it would take me two pages to list them". Sellers then depicts a scenario where, with the society's loss ratio soaring, Continental demands rate increases at which time Sellers says "we can no longer rescue your Group". Further, he stated that plaintiffs "after getting nowhere

for over two years", first tried to solve the problem by hiring McKendry & Associates. Rupert's purpose in retaining this insurance agency was to expand its marketing and sales force. However, Sellers characterized this arrangement as one that would create a "conflict of interest". Sellers characterizes Rupert's other solutions to the problem facing the society as an "attempt to threaten you" and "to bluff you into compulsory premium increases". Referring to a letter from Continental to the society, defendant says that he doubts whether anyone would seriously believe that plaintiffs' "parade of blunders" is caused by any zeal on his part in behalf of the society. The Continental letter, Sellers avers, corrected plaintiffs' "threats and misstatements" regarding loss of coverage and automatic rate increases. In over two years, Sellers says, plaintiff has not succeeded in converting the loss ratio, his "[f]ailure is a proven fact" and although plaintiff has tried to "force you" into rate increases, "his threats and bluffs" have been called. Sellers concludes the letter by telling the society that their only solution is to transfer the business to him immediately. If the society acts now, "our office will make Herculean efforts to extricate you from your present precarious position".

Two weeks later the president of the Medical Society wrote Continental advising that it would retain Continental, but only if it recognized the society's indorsement from Rupert & Lutz to Sellers & Company. Four days later Continental wrote acknowledging the change of indorsement.

There remains only to add that approximately a year before, in December, 1969, Mr. Sellers had made a written offer to purchase Rupert & Lutz by purchasing the two-thirds interest of Mr. Lewis and Mr. Lutz in order to gain

control, intending later to make an offer to the Ruperts. On March 26, 1971—two days after the society's termination —Rupert & Lutz received a letter from Sellers offering to buy its remaining professional group business. A "fast" decision was suggested so that the groups could be advised that they had been "sold" rather than speculating as to why Rupert & Lutz was no longer administrator for Monroe County Medical Society. Plaintiffs responded that its agency was not for sale. Both parties are still engaged in the same businesses as they were in 1970-1971.

At the trial Mr. Sellers conceded that at the time he assumed the role of impartial consultant he was not a registered consultant, but merely a licensed broker competing with plaintiffs. He conceded that he believed that once he got the Medical Society business that plaintiff Rupert would be more reasonable about selling his interest in the Rupert & Lutz Agency and at a more reasonable price. He admitted that after the transfer of the society's business to his agency he went out and attempted to obtain group business from the Rupert & Lutz Agency by asking such groups to transfer their business to him. Further, he expressed his view to the Medical Society, subsequent to the transfer, that Rupert & Lutz was having money problems. He said he thought they were in financial difficulty, although he had no independent basis for so believing; but, nevertheless, he did not hesitate to so state in writing. The matters that he set forth in his original report of December 28, 1970 and in the letter of March 10, 1971 and the conditions and facts he stated emanated or originated in each case solely from Mr. Sellers himself.

CONTENTIONS OF THE PARTIES

On appeal defendants argue that (1) the trial court's charge was constitutionally defective because it failed to

include "fault" as required by *Gertz v Robert Welch, Inc.* (418 US 323); (2) the libel claim should have been dismissed as a matter of law as the allegedly libelous letter of March 10, 1971 was a statement of opinion only or, in the alternative, the trial court should have charged the jury that an opinion cannot be libelous; (3) it was error to submit the March 10, 1971 letter to the jury as it was qualifiedly privileged as a matter of law; (4) the tortious interference claim should have been dismissed as an attempt to avoid the running of the Statute of Limitations and the instructions to the jury on this claim were erroneous in failing to charge that plaintiffs must prove unlawful actions or malice on the part of defendants; (5) the damages awarded in the libel and tortious interference claims were unfounded and improper; (6) the trial court erred in refusing to charge that one Richard Gates was an interested witness, in admitting evidence of defendants' financial well-being, and in not marshaling the evidence; and, finally, (7) the award of prejudgment and compounded interest was erroneous.

Plaintiffs respond that *Gertz v Robert Welch, Inc.* does not apply to suits between private parties; that defendants failed to take exception to that part of the libel charge on the issue of fault and, in any event, the jury found actual malice. Plaintiffs further contend that the trial court properly charged and ruled on the other issues raised by defendants.

I—GERTZ V. WELCH REQUIREMENT OF FAULT APPLIED TO THE FACTS AND CHARGE

The common law of libel in New York makes any libelous written words published or concerning another which are false and tend to injure another's reputation and discredit that person in the estimation of the public. To make an

article libelous per se the charge must impeach the honesty, virtue or character of the complaining party or expose that person to public hatred, contempt, ridicule or obloquy or injure the person in his business or occupation (1 Seelman, Law of Libel and Slander in State of NY, par 11, pp 10-11). Actions libelous per se are actionable without proof of special damages (*Mencher v Chesley,* 297 NY 94, 100); those not actionable per se, but *per quod,* must allege and prove special damages (34 NY Jur, Libel and Slander, § 3) which results in loss of pecuniary nature (*Bishop v New York Times Co.,* 233 NY 446, 452).

Damages have traditionally been awarded, depending on the purpose served, either as compensatory or punitive (*Crane v New York World Tel. Corp.,* 308 NY 470, 476). Where the purpose is reparation for injury sustained, the damages are categorized as compensatory. As such they may be either nominal or substantial. Further, compensatory damages in New York have been subdivided into two separate classifications: general, which are damages presumed to flow from the libelous act complained of and for which no proof was required; and special, which were damages actually caused by the act complained of and were the proximate consequence of it. Special damages, however, as distinct from general, needed to be pleaded and proved. Punitive damages, also called exemplary, are a punishment imposed as a result of the publication of the libel (*Taylor v Church,* 8 NY 452, 460). This type of damages has long been recognized in New York. The first case permitting them was decided in 1808 (*Tillotson v Cheetham,* 3 Johns, 56, 64 [per KENT, Ch. J.]). But in order to return a verdict of punitive damages a jury must find actual malice, long-defined in New York as including personal ill-will or spite as well as a libel recklessly or willfully published (1 Seel-

man, Law of Libel and Slander in State of NY, par 330, p 438; Clark, New York Law of Damages, § 58; *Holmes v Jones*, 147 NY 59, 67).

On this ancient landscape with its encrusted complexities, *Gertz v Robert Welch, Inc.* (418 US 323, *supra*) cut a wide swathe uprooting and eliminating some concepts deeply embedded in the law of libel. The common-law doctrine of strict liability and the concomitant doctrine of presumed damages were eliminated. Punitive damages are permitted only upon a demonstration that the standard set forth in *New York Times Co. v Sullivan* (376 US 254)—publishing the libelous statement with knowledge of falsity or reckless disregard for the truth—has been violated (*Gertz, supra*, pp 347, 349; *Chapadeau v Utica Observer-Dispatch*, 38 NY 2d 196, 199). Broad rules of general application were laid down in an attempt to reconcile State law with the competing constitutional interest commanded by the First Amendment (*Gertz, supra*, p 349). Even in private defamation suits, as here, liability for libel may not be imposed on a defendant without a finding of fault (*id.*, p 347). Plaintiffs who fail to prove malice as defined in *New York Times Co. v Sullivan* are restricted to compensation for actual injury (*id.*, p 349). Actual injury is not limited to out-of-pocket expense, but includes injury to reputation and standing in the community, humiliation and mental anguish (*id.*, p 350).

Thus, actual damages now replaces the term compensatory damages as heretofore used in New York. The type of injuries embraced within its two subdivisions—general and special—may now be recovered as actual damages, with the significant difference that the damages formerly recovered as general damages must now be supported by competent proof and may not be presumed to flow from the libelous publication (*Gertz, supra*, p 350).

In my view *Gertz v Robert Welch, Inc.* has application to a private defamation suit where, as here, the defendant is a nonmedia publisher. The rationale for the *Gertz* decision is the balancing of the "legitimate state interest underlying the law of libel [which] is the compensation for individuals for the harm inflicted on them by defamatory falsehood" (p 341) with the danger that punishment in damages for the defamatory falsehood "runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press" (p 340). The First Amendment imperatives are not for the protection of the media alone, but are to be accorded to the public generally (*Branzburg v Hayes,* 408 US 665; The Communicative Torts and the First Amendment, 48 Miss LJ 671, 698-699; The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond, 6 Rut-Cam LJ 471, 511). The Supreme Court left it to the States to define an appropriate standard of liability (*Gertz, supra,* p 347). The highest court of New York has held that to warrant recovery the private individual plaintiff "must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties" (*Chapadeau v Utica Observer-Dispatch, supra,* p 199). Absent any suggestion to the contrary by the Court of Appeals, there is no reason to afford media defendants greater protection than private individuals sued for defamation. Further, as a practical matter and for reasons of logic, there is more consistency and simplicity where one uniform rule governs in defamatory falsehood litigation. Adopting varying rules dependent upon the identity of the parties, whether there is public interest of a public

statement and the like will only reintroduce those complexities into the law of libel which *Gertz v Robert Welch, Inc.* swept away.

Defendants' argument that the trial court erred in charging liability without fault is without merit on the record before us. We reach this conclusion because we find that the trial court did charge that an award for punitive damages must be predicated upon a finding of actual malice and the jury returned a verdict for such damages for both plaintiffs.

Considered as a whole the charge instructs the jury that a finding of malice must be predicated upon a finding that the defendant acted in reckless disregard for the truth. This charge adequately satisfies the fault requirements of *Chapadeau v Utica Observer-Dispatch.*

Substantial and credible evidence exists in the record to support the jury's finding of malice. The totality of the onslaught was such that the jury could have found malice from the sheer number of misrepresentations. Defendant Sellers' extensive writings and conversations with the Medical Society and Continental plainly attacks the plaintiffs' professional and personal competence, their honesty, leadership of their own agency, the financial stability of the agency, and its relationship with other groups and the advice, counseling and service they had rendered to the Medical Society for a period of over 25 years. The letter of March 10, 1971 clearly libels plaintiffs in these respects. Undeniably persuasive to the jury was the fact that all these machinations were accomplished while Sellers held himself out as an independent consultant motivated by concern for plaintiffs when, in reality, as revealed at the trial, he was acting covertly out of a desire to further his own business interests, keeping plaintiffs in the dark until it was too late for them to defend themselves.

II—THE LETTER OF MARCH 10, 1971 AS A STATEMENT OF OPINION ONLY

The mixture of opinion and fact which the letter contains is well conveyed by the statement "[h]is [Rupert's] success is not a matter of conjecture. Failure is a proven fact. Your present loss ratio exceeds 80 percent". Since the letter of March 10, 1971 itself and defendant's testimony are all to the effect that Sellers had opinions backed up by hard facts and concrete evidence, the letter was not constitutionally protected as a statement of defendant Sellers' opinion. In our view the trial court correctly concluded as a matter of law that the March 10 letter was not constitutionally protected as a statement of opinion only (see *Gertz v Robert Welch, Inc., supra,* pp 339-340; see, also, *Rinaldi v Holt, Rinehart & Winston,* 42 NY2d 369, 381, mot for rearg den 42 NY2d 1015, cert den 434 US 969).

III—THE MARCH 10, 1971 LETTER AS PROTECTED BY A QUALIFIED PRIVILEGE

A bona fide communication made upon any subject matter by one person who has an interest, or in reference to which he has a duty, is privileged if made to another having a corresponding interest or duty. The privilege exists even though the duty is not a legal one, but only a moral or social duty; and, further, despite the fact that the communication contains incriminating matter which without the privilege would be actionable defamation (*Stukuls v State of New York,* 42 NY2d 272, 278-279; *Byam v Collins,* 111 NY 143, 150). However, a qualified privilege does not extend beyond the statement a writer makes, believing in good faith that such a statement is true, while in the performance of his duty (*Shapiro v Health Ins. Plan of Greater N. Y.,* 7 NY2d 56, 60-61; *Pecue v West,* 233 NY 316). Nor

does the qualified privilege, as the term itself suggests, confer absolute immunity; it may be overcome by an evidentiary showing that the defamatory statements were motivated by malice, i.e., ill-will, personal spite or culpable recklessness or negligence. The court must determine whether the subject matter, defendants' interest in it and relation to it are such as to make the publication privileged, i.e., whether the occasion is one to which the law accords the protection of a privilege (*Cheatum v Wehle,* 5 NY2d 585, 594).

There just is no qualified privilege to make a defamatory attack merely to protect one's business interest. An attack of this nature is not to be confused with the making of a privileged statement to others who share a common interest in the same property, business or business relationship (*Shenkman v O'Malley,* 2 AD2d 567, 577; see 35 NY Jur, Libel and Slander, §§ 97, 102). To escape liability, an otherwise libelous statement must be limited in scope to its purpose and made only on a proper occasion, in a proper manner, and to proper parties (*Triggs v Sun Print. & Pub. Assn.,* 179 NY 144; *Zirn v Bradley,* 268 App Div 1063, mots den 269 App Div 672; *Morton v Knipe,* 128 App Div 94). And the language of the communication itself may be so extravagant, vituperative or venomous as to destroy the privilege (*Green v Kinsella,* 36 AD2d 677).

The trial court submitted the question of the existence of a qualified privilege to the jury as a matter of fact. On balance it seems apparent that Sellers and the Medical Society had a common business interest. Nonetheless, even assuming that the jury found that a qualified privilege existed, they must also have found that the defendants' privilege was destroyed through malice or abuse in order to have reached a verdict in favor of the plaintiffs. Since the

trial court correctly charged the jury on these issues and there is sufficient evidence to support its verdict, we conclude that defendant's contentions with respect to the March 10 letter enjoying a qualified privilege are without merit.

IV—THE TORTIOUS INTERFERENCE CLAIM AS AN ATTEMPT TO AVOID THE STATUTE OF LIMITATIONS AND THE COURT'S INSTRUCTIONS ON THIS CAUSE OF ACTION

It is established law that plaintiff may not circumvent the one-year limitation period applicable to defamation actions by describing the tort as an injurious falsehood or an interference with economic relations (*Noel v Interboro Mut. Ind. Ins. Co.*, 29 NY2d 743, affg 31 AD2d 54; *Morrison v National Broadcasting Co.*, 19 NY2d 453). The tortious interference or inducing breach of contract claim (the sixth cause of action) is not being used here either to evade the Statute of Limitations or to put before the jury otherwise inadmissible evidence. Plaintiffs were entitled to have the jury consider this cause of action as an alternative theory as a possible basis for recovery. However, plaintiff may have but a single recovery for a single harm sustained.

Defendants mistake the nature of the cause of action alleged by plaintiffs and submitted to the jury. It is clear that the charge taken as a whole instructs the jury concerning the inducement of a breach of contract. An action lies against one who intentionally and knowingly and without reasonable justification or excuse induces a breach of contract (32 NY Jur, Interference, § 19). The elements in a cause of action for inducing breach of contract are: (1) the existence of a valid contract; (2) defendant's knowledge of the contract; (3) defendant intentionally procuring the breach of that contract; and (4) damages (*Israel v Wood Dolson Co.*, 1 NY2d 116). There is no longer any require-

ment that there be actual malice (*A. S. Rampell, Inc. v Hyster Co.*, 3 NY2d 369). Where the contract is terminable at will or upon notice, no cause of action lies for inducing termination of the contract so long as the termination is not accomplished by defendant's fraud, misrepresentation or other unfair conduct (32 NY Jur, Interference, § 22). The instructions given are consonant with the law on inducing breach of contract. Indeed, defendants concede that the instructions on interference with a contractual relationship are correct. That portion of the charge to which they objected is merely a continuation and a completion of the properly rendered inducing breach of contract charge.

V—THE DAMAGES AWARDED IN THE LIBEL AND TORTIOUS INTERFERENCE WITH A CONTRACTUAL RELATIONSHIP CLAIMS

A—LIBEL CLAIM

The jury awarded plaintiff Rupert & Lutz $1 in general damages, $208,000 in special damages and $1 punitive damages in the libel claim. It awarded plaintiff Rupert individually $200,000 in general damages, $22,000 in special damages and $1 punitive damages on the libel claim.

Fixing the amount of damages in a libel action is peculiarly within the province of the jury, which is considered the supreme arbiter, and the court, if possible, should avoid invading that field (*Toomey v Farley*, 2 NY2d 71; *Kruglak v Landre*, 23 AD2d 758; 35 NY Jur, Libel and Slander, § 168). The amount ought not to be disturbed unless it is so manifestly unjust as to indicate that the jury reached its verdict through passion, bias, prejudice rather than upon principles of sound discretion, considering circumstances in mitigation or aggravation (35 NY Jur, Libel and Slander, § 168). We conclude under such tests that the $200,000 general damages

awarded to Rupert individually is not so shockingly excessive as to require us to disturb it.

However, there was no testimony as to special damages suffered by Rupert personally. The sole witness on behalf of plaintiffs testifying as to the measure of damages was Robert M. Morrison, who was qualified as an expert appraiser of insurance agencies and who testified as to the difference in market value of the Rupert & Lutz Agency before and after plaintiffs lost the Medical Society account. In the absence of testimony of Rupert's actual personal damages the jury's award of $22,000 to plaintiff Rupert individually is without support and must be reversed.

The jury awarded $208,000 special damages to Rupert & Lutz. The only evidence of special damages introduced by plaintiffs was the testimony of the same expert who based his opinion on damages upon his evaluation of the Rupert & Lutz financial and business records, none of which had been introduced into evidence.

In New York an expert ordinarily may not base an opinion on facts which he did not personally observe or which are not in evidence. Where cross-examination reveals that an expert's opinion is based on facts that are not in evidence, the opinion must be stricken (*Cassano v Hagstrom,* 5 NY2d 643, mot for rearg den 6 NY2d 882; *People v Keough,* 276 NY 141; *Smith v Squire Homes,* 38 AD2d 879). Recently, however, the Court of Appeals in *People v Sugden* (35 NY2d 453) outlined two exceptions to the rule stated in *People v Keough (supra).* The court held that an expert may be permitted to base an opinion on material not in evidence provided: (1) the data relied on is a kind ordinarily accepted as reliable by experts in the field; or (2) where the material does not so qualify, the expert may state his opinion where he is subject to full cross-examina-

tion at trial (*People v Sugden, supra,* pp 459, 461). The expert's opinion here was properly admitted under the first exception set forth in *Sugden* which permits an expert to testify as to his opinion where the opinion is based upon evidence outside the record, if the evidence relied upon is the kind of data ordinarily accepted as reliable by experts in the field. Further, defendants knew plaintiffs' theory of damages and had full access through discovery or subpoena to these business records which are ordinarily relied upon as proof of market value of a business. Thus, we conclude that there exists a proper basis for the jury verdict of $208,000 special damages in favor of plaintiff Rupert & Lutz Agency.

Defendants' final argument, that the $208,000 special damages awarded to Rupert & Lutz is excessive, is without merit. Plaintiffs' expert testified that the "potential factor" was a large factor in his determination and loss of future income is a proper element in the measure of special damages. This testimony was not of a speculative nature and the jury determination based upon it should not be disturbed.

B—TORTIOUS INTERFERENCE WITH A CONTRACTUAL RELATIONSHIP CLAIM

We agree that there is no basis in the record for the jury award of $20,000 compensatory damages to plaintiff Rupert individually in the interference claim. The only evidence of financial loss was Mr. Morrison's testimony as to the diminution in value of the Rupert & Lutz Agency and these damages were fully recovered in the $208,000 award to defendant Rupert & Lutz. There was no further evidence adduced by plaintiffs on the issue of damages to sustain a further award on the basis of financial loss to plaintiffs. This award must, therefore, be reversed.

Defendants further maintain that the jury verdict of $15,000 punitive damages in the interference claim was improper in that there was no showing of public injury. Concededly, there can be no award of punitive damages where there is no public injury (*Vinlis Constr. Co. v Roreck,* 27 NY2d 687, mot for rearg den 27 NY2d 1006; *American Electronics v Neptune Meter Co.,* 30 AD2d 117, republished at p 529). In New York punitive damages are recoverable in actions *ex delicto* where there exist ingredients of malice, fraud, oppression, insult, wanton or reckless disregard of plaintiff's rights or other circumstances of aggravation. Such damages are also recoverable for intentional torts committed wantonly or maliciously, and for interference with property rights where the damage results from malicious acts, knowingly and willfully committed, such as interfering with the free use of property or conspiring to injure one in his trade or business (*Le Mistral, Inc. v Columbia Broadcasting System,* 61 AD2d 491; *Oehlhof v Solomon,* 73 App Div 329; 14 NY Jur, Damages, § 180). The right to carry on a lawful business is a property right (*Federal Waste Paper Corp. v Garment Center Capitol,* 268 App Div 230, 234, affd 294 NY 714). Since an award of this nature should not lightly be disturbed (*Nardelli v Stamberg,* 44 NY2d 500, 503-504), the $15,000 verdict for the intentional tort of inducing a breach of a contractual relationship should stand.

VI—MISCELLANEOUS ALLEGED ERRORS

Briefly, with respect to defendant's contentions of miscellaneous errors, the trial court properly instructed the jury regarding interested witnesses. The several brief allusions to defendant's wealth served a legitimate purpose (*Rupert v Sellers,* 48 AD2d 265) and there was no abuse

of discretion by the trial court in making only limited references to the facts in marshaling the evidence.

VII—THE AWARD OF PREJUDGMENT AND COMPOUNDED INTEREST

The prejudgment interest on the $208,000 special damages awarded to plaintiff Rupert & Lutz and on the $22,000 special damages awarded to plaintiff Rupert was improperly awarded and must be reversed.

Allowance of interest is provided for in CPLR 5001, 5002 and 5003. Interest on a cause of action from the earliest ascertainable date the cause of action existed until the verdict is rendered is permitted as a matter of right in all actions seeking to recover for property loss whether in contract or tort (CPLR 5001, subds [a] and [b]). CPLR 5001 essentially codified the common-law rules with respect to the award of prejudgment interest. Those long-settled rules had in this State distinguished between those classes of actions where interest is given as of right as part of the damages on the loss from the time of injury (e.g., trespass, replevin); those classes where interest from date of accrual is not recovered as of right, but may be granted in the discretion of the jury according to the circumstances of the case (e.g., injuries to property through negligence); and classes of actions sounding in tort where no interest is allowed from the date of the injury until the verdict (e.g., assault and battery, libel, slander, false imprisonment and the like) (*Wilson v City of Troy,* 135 NY 96, 105; see, also, *Flamm v Noble,* 296 NY 262, 268). The Law Revision Commission comments on the predecessor statute to CPLR 5001 (Civ Prac Act, § 480) make it clear that this statute does not change the traditional common-law rules with respect to tort actions, other than those for violation of property rights (1950 Report of NY Law Rev Comm., p 101).

We conclude, therefore, that absent a controlling precedent or legislative enactment there should be no allowance of interest from time of injury to the date of the verdict in this libel action. Interest on the verdict until judgment (CPLR 5002) and interest from the date of the entry of the judgment until payment (CPLR 5003) is, of course, recoverable (Siegel, New York Practice, § 411, p 544). Finally, the award of compound interest is also improper (*Levine v U. N. Cleaners,* 4 AD2d 955; *Matter of Schuster,* 167 Misc 194, mod other grounds 257 App Div 55, affd 284 NY 569; 2 Clark, New York Law of Damages, § 898).

Accordingly, the judgment should be modified and, as modified, it should be affirmed.

DILLON and HANCOCK, JR., JJ., concur with SIMONS, J.; CARDAMONE, J., concurs in a separate opinion; MOULE, J.P., not participating.

Judgment modified, on the law and facts, and, as modified, affirmed, without costs.

APPENDIX C

Excerpts From Motion For Permission to Appeal to the New York Court of Appeals

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Caption and title page omitted

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[1]

Caption omitted

NOTICE OF MOTION FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE, that upon the annexed affidavit of Lewis A. Kaplan, Esq., sworn to June 21, 1979; the exhibits thereto; the accompanying brief; the Record on Appeal in the Appellate Division, Fourth Department, currently on file in this Court; the briefs in the Appellate Division; and upon all prior papers and proceedings had herein, the undersigned will move this Court, at a term for motions thereof, to be held at the Court of Appeals Hall, Albany, New York on July 2, 1979 for an order, pursuant to CPLR 5602(a)(1)(i), granting defendants-appellants permission to appeal to this Court from so much of said order of the Appellate Division, Fourth Department, entered December 15, 1978 as affirmed portions of the judgment of the Supreme Court, Monroe County, entered on May 12, 1977, and for such other and further relief is just and proper.

[2] The grounds upon which such permission is asked, set forth in greater detail in the annexed brief, which is hereby made a part hereof, include the following:

1. That such appeal is required in the interests of substantial justice.

2. That the questions of law presented should be reviewed by this Court and are questions of general importance.

3. That said questions of law have not been determined by this Court.

Dated: New York, New York
June 21, 1979

[Names of counsel omitted]

Appendix C—Excerpts From Motion For Permission to Appeal to the New York Court of Appeals

Caption omitted

[3] AFFIDAVIT IN SUPPORT OF MOTION FOR PERMISSION TO APPEAL

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LEWIS A. KAPLAN, being duly sworn, states:

1. I am a member of the firm of Paul, Weiss, Rifkind, Wharton & Garrison, attorneys together with the firm of Watson, McGarvey, Hetzelt & Bennett, for defendants-petitioners in this action. I am fully familiar with the facts and circumstances relating to this motion.

2. This affidavit is submitted in support of defendants' motion for permission to appeal to this Court from so much of the order of the Appellate Division, Fourth Department, entered December 15, 1978, as affirmed portions of the judgment entered in Supreme Court, Monroe County, on May 12, 1977.

[4] 3. The defendants, Charles J. Sellers, Jr., and his insurance agency are faced with an enormous judgment of $423,005 plus interest. Of this total, $408,003 constitutes one of the largest defamation awards in this State's history. Mr. Sellers' offense was to respond candidly to a request from the Monroe County Medical Society for his views on a proposal put to it by his competitor, Rupert & Lutz Agency, Inc. At about the same time, the responsible persons at the Medical Society replaced Rupert & Lutz as the administrator of aspects of its insurance program with

Appendix C—Excerpts From Motion For Permission to Appeal to the New York Court of Appeals

Mr. Sellers' agency. Plaintiffs brought this action, claiming essentially that the discharge of Rupert & Lutz was caused by allegedly libelous opinions expressed by Mr. Sellers in a letter of March 10, 1971 which was sent to three individuals at the Medical Society. In fact, however, there was no evidence that the letter had any bearing on the Society's action.

4. As the accompanying brief demonstrates more fully, the judgment below raises substantial and novel legal issues which ought to be decided by this Court, both in order to fulfill its role of authoritatively determining New York law and in the interests of substantial justice to Mr. Sellers. Without repeating what is set out in our brief, the principal issues include the following:

(a) The Fourth Department sustained a $200,000 award of general or presumed damages to Philip D. [5] Rupert, Jr., a principal of Rupert & Lutz, despite the lack of any evidence of "actual injury" to him or of any finding that Mr. Sellers knew his letter was false or acted in reckless disregard of its truth.* If *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), applies to defamation cases against non-media defendants, this award was improper. Accordingly, this Court should grant leave to appeal in order to determine whether *Gertz* applies in non-media cases.

(b) Defendants contended below that the letter in question, if it was defamatory at all, contained only

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* Mr. Justice Cardamone, concurring below, thought the jury verdict entailed a finding of reckless disregard. For reasons set forth in our brief, the learned Justice was clearly mistaken.

constitutionally protected statements of opinion which could not form the basis of a libel award. *Gertz, supra,* 418 U.S. at 339-40; *Rinaldi* v. *Holt, Rinehart & Winston, Inc.,* 42 N.Y.2d 369, 381, *cert. denied,* 434 U.S. 969 (1977). The trial court denied motions for a directed verdict and judgment n.o.v. and refused, over defendants' exception, to charge the jury that it could not base a verdict on statements of opinion. The jury returned a general verdict on the libel count of more than $423,000.

The Fourth Department affirmed, holding that the letter did not contain *only* statements of opinion, [6] thus implying that it contained at least some protected opinions. The case therefore presents two related issues:

(1) Whether defendants are entitled to judgment on the ground that the letter, if defamatory at all, contains only protected statements of opinion, and

(2) Whether defendants are entitled to a new trial on the ground that the letter contains some statements of opinion and it is impossible to determine, in light of the general verdict and the charge, whether the verdict rests on constitutionally protected opinion or on other matters.

5. Thus, this case presents a number of issues of law which, we submit, are of substantial general importance. Many are issues as to which courts in other states are divided. Resolution of these issues by this Court is necessary for the guidance of trial courts and litigants in dealing with defamation cases.

Appendix C—Excerpts From Motion For Permission to Appeal to the New York Court of Appeals

6. Not only are the issues presented of substantial public importance, but fairness, we submit, requires review. The legal issues presented are difficult, and the Fourth Department was not unanimous as to some of them. We [7] respectfully submit that a judgment of this size, in these circumstances, should be subject to the most searching scrutiny by our State's highest court.

7. Granting leave to appeal in this case will impose no substantial additional burden on this Court. On January 19, 1979 plaintiff Rupert & Lutz Agency, Inc. appealed as of right to this Court from that portion of the order of the Appellate Division, Fourth Department, which reversed the award to it of prejudgment interest. That appeal raises many of the issues presented by this motion because an award of prejudgment interest, even if otherwise proper, would be inappropriate if the underlying judgment is erroneous. In consequence, this Court will hear most aspects of this case irrespective of the outcome of this motion. Moreover, on April 25, 1979, as evidenced by their letters (Exhibit I, p. 37), counsel for plaintiffs and defendants agreed that plaintiff's appeal would be held in abeyance pending the determination of this motion so that, if this motion is granted, both appeals may be heard together.

8. The order appealed from was entered by the Appellate Division, Fourth Department, December 15, 1978 (Exhibit A, p. 9). Notice of entry of that order was mailed December 26, 1978 (Exhibit B, p. 10). This Court dismissed defendants-appellants' timely appeal as of right by order [8] entered March 22, 1979 (Exhibit C, p. 11). By letter postmarked March 29, 1979, plaintiffs gave defendants notice of that order (Exhibit D, p. 12). Defendants

sought leave to appeal from the Appellate Division, Fourth Department, which denied defendants' timely motion for permission to appeal to this Court by order entered May 18, 1979 (Exhibit E, p. 13). On May 22, 1979 plaintiffs mailed notice of entry of that order to defendants' counsel (Exhibit F, p. 14). This Court therefore has jurisdiction of this motion. *Park East Corp.* v. *Whalen,* 38 N.Y.2d 559, 560 (1976); CPLR 5514(a); CPLR 2103(b), subd. 2.

9. The Order of the Appellate Division, Fourth Department, was based upon a majority opinion of Mr. Justice Simons and a concurring opinion of Mr. Justice Cardamone (Exhibit G, p. 15). The judgment of the Supreme Court, Monroe County (Exhibit H, p. 33), was rendered without opinion.

10. The record on appeal to the Appellate Division, Fourth Department, already is on file in this Court in connection with plaintiff's appeal. Copies of the Appellate Division briefs below are being filed with this motion.

11. We respectfully request that leave to appeal be granted, in the interests of substantial justice, and in accordance with the provisions of subdivision (a)(1) of CPLR 5602.

s/ LEWIS A. KAPLAN

Jurat omitted

APPENDIX D

Letter dated March 10, 1971

"March 10, 1971

Mr. Donald M. Irish, Executive Director
Medical Society of the County of Monroe, Inc.
1441 East Avenue
Rochester, New York 14610

Dear Don:

Thank you for requesting our comments on the recent correspondence from Pete Rupert and John Gaertner. *Both letters seem to miss the target by a wide margin. They are just what we feared and expected.*

Re: Pete Rupert's correspondence:

The major problem at the present time is your worsening loss ratio. *The attendant problem is how do we head off those $200.00 and $300.00 annual rate increases per policy.*

It seems obvious from the tone of Pete's letter that he will now, reluctantly, go 'through the motions' of a voluntary installation of the Guaranteed Renewable policies, rather than compel the higher rates of the mandatory conversion. Here's why.

When the rates are increased, Pete Rupert's commissions will increase. Conversely, if he really works now to prevent the rate increases, his expenses will increase. To correct this situation, Pete would have to hire a considerable staff of trained salesmen capable of winning back into Monroe Medical all those many young insurable Physicians who have placed their insurance elsewhere.

Appendix D—Letter dated March 10, 1971

While he does not mention it, a complete program of re-enrollment would be necessary. To use the mailings effectively, he needs a substantial investment in Friden flexowriters. There are so many things he needs and doesn't have to do the job that it would take me two pages to list them.

The time element is of considerable importance. Your present loss ratio is in excess of 80%. The way it is headed, by the time Rupert found and hired a professional group specialist and trained a sales force, your Group would be defunct. If Peter goes through the motions, makes a mailing or two, and a few phone calls, the premium is Not going to increase. Instead, it will probably decrease as the younger Physicians avail themselves of the better policy at the new lower rates. With losses constant, and decreases in premiums, your loss ratio will soar.

The next scene will be in about six months when the company tells Pete to inform you that they must have substantial rate increases. Once the company solidifies this position, we can no longer rescue your Group. If the company were then to agree to give us time to correct the problem, Rupert could sue them for complicity in aiding the transfer of the business from his Agency to ours.

What Pete Rupert has Not put in his letter to you is how he intends to correct the present situation. After getting nowhere for over two years, his first solution was to hire McKendry and Associates. His other two solutions were to attempt to threaten you and bluff you into compulsory premium increases.

Re: John Gaertner's letter—March 2, 1971: *John has made a most persuasive apology for Peter Rupert. We doubt, however, that anyone would seriously believe that Pete's*

parade of blunders is prompted by an 'excess of zeal' in behalf of the Society.

He has clearly corrected Pete's threats and misstatements of: (1) Loss of coverage, and (2) 'Automatic' compulsory rate increases at 63% loss ratio. Mr. Gaertner confirms, by inference, that the company also had to force Pete to sever the McKendry association—'in the best interests *of all parties* concerned' [emphasis on "of all parties" added by Sellers].

Obviously, the past record of Rupert & Lutz, 25 years ago, is not relative to today's much changed, highly competitive market. The Agency personnel is also considerably changed. Thus, John Gaertner's letter is somewhat misleading in these areas.

Summary:

Your only solution is to transfer the endorsement now. Pete Rupert has had over two years (since Sep't, 68') to use the new GXX contract to correct your loss ratio. His success is not a matter of conjecture. Failure is a proven fact. Your present loss ratio exceeds 80%.

Peter has tried several times to force you into a compulsory rate increase situation. His threats and bluffs have been called. You now have an ideal opportunity to salvage your situation because of *his actions.* If you do seize this opportunity, I want you to know that our office will make Herculean efforts to extricate you from your present precarious position.

We think we can do the job if you transfer the endorsement. The company has agreed to recognize the transfer. Action is imperative while you have a salvageable situation.

Appendix D—Letter dated March 10, 1971

This entire fiasco with McKendry Associates, the N.A.R.I., plus all of insurance agent George Arden's personal little Medical Societies reminds me of the old statement that 'those who cannot learn from the past are condemned to relive it in the future.'

With your help, we can still correct this situation. We can even, I believe, earn improvements and betterments in your Group Plan as time and experience permit. We have done this on your life insurance. We can, with your help, do likewise on the disability.

Sincerely,

s/ Charles J. Sellers, Jr.

cc: Dr. Robert Webster, President
Dr. John G. Hamilton, Chairman
Medical Economics Committee"

APPENDIX E

Charge

CHARGE (McDowell, J.)

The Court: Mr. Hartman, Mr. Murty, Members of the Jury. In this action the plaintiffs Philip D. Rupert, Jr. and Rupert & Lutz Agency, Inc. are seeking verdicts at your hands from the defendants Charles J. Sellers, Jr. and Charles J. Sellers Company, Inc. for damages which they claim to have sustained as a result of libelous words written, intentional interference with plaintiffs' contractual and business relations, violation of Section 127 of the New York State Insurance Law by the defendants.

Now, there has been joined with this lawsuit another lawsuit wherein Charles J. Sellers, Jr. and Charles J. Sellers & Company, Inc. are the plaintiffs, and they are seeking a verdict at your hands from the defendants Philip D. Rupert, Jr. and Rupert & Lutz Agency, Inc. for damages which they claim to have sustained as a result of libelous words written by the defendants.

In the performance of our respective duties in administering justice between these parties it is my obligation as the Court to instruct you as to the rules of law which apply to this case, and you are required to accept and follow these instructions as being the law of this state. On the other hand, you are the sole judges of the facts. It is for you alone to determine from the evidence what the facts really are.

I might say here that during the course of this trial certain objections have been made upon which I have been obliged to rule. Those rulings were simply on questions of law which do not concern you, the jury, in any way. They are not intended, nor is anything that I said during the

course of this trial, or may say to you in the course of these instructions, in any way to indicate to you that I have a personal opinion one way or the other as to any of the questions of fact which are to be determined by you alone.

Normally the burden of proof rests on the plaintiff. However, in this trial the burden of proof shifts in several instances, and I will later advise you accordingly as to and upon whom the burden rests.

Proof is established by a fair preponderance of the credible evidence. Credible evidence means the testimony and exhibits that you find worthy to be believed. A preponderance means the greater part of such evidence. That does not mean the greater number of witnesses, or greater length of time taken by either side. The phrase refers to the quality of the evidence, that is its convincing quality, the weight and the effect it has on your minds.

The law requires that in order for the plaintiff to prevail upon an issue the evidence that supports his claim must appeal to you as more nearly representing what took place than that opposed to his claim. If it does not, or if it weighs so evenly that you are unable to say that there is a preponderance on either side, then you must resolve the question against the party who has the burden of proof, and in favor of the opposing party. It is only if the evidence favoring the plaintiffs' claim outweighs the evidence opposed to it that you can find in favor of the plaintiff. The same rule applies to the burden of proof which the law imposes upon the defendant and its claims as hereinafter to be set forth by the Court.

The first cause of action by the plaintiff in this lawsuit is an action to recover damages for libel. Libel is a publication in writing which tends to disgrace or discredit a person in the community. Plaintiffs claim that defendants wrote a letter dated March 10, 1971 to Donald M. Irish, then Execu-

tive Director of the Monroe County Medical Society, and sent copies to Dr. Robert Webster, then President of the Monroe County Medical Society, and Dr. John G. Hamilton, then Chairman of the Medical Economics Committee of the Monroe County Medical Society. That letter, which plaintiffs claim was circulated as to others also, is in evidence and before you. Now, if a publication charges a professional person with incompetence, damages may be recovered without showing that the publication caused any specific financial loss to the plaintiff. If you find that the letter of the defendants as understood by those who received it, and read it, did disgrace the plaintiffs' reputation, or discredit them in the community, your verdict will be for the plaintiffs. If you find that the letter did not disgrace plaintiffs, or discredit them in the community, then your verdict will be for the defendants.

Defendant contends that the written statement it is charged with making is in fact true. Truth is a complete defense in an action for a defamation no matter how injurious the publication. The burden is upon the defendant to prove by a fair preponderance of the credible evidence, as I have defined that term for you, that at the time the statements were made they were true. To establish a defense of truth, defendant must prove that each statement was true. It is not sufficient that a part of the statement was true. This does not mean, however, that every word and every sentence need be proved true. Variances in material particulars may be disregarded. The test is whether the statement as published would have a different effect on the mind of the readers or hearer than the truth would have produced. You will determine from the evidence presented what the truth was, and compare that with the written statement, which you find was made by

the defendants, taking those statements and words, according to the ordinary meaning of the language used. If you find that there was no substantial difference between the statement and the truth, your verdict will be for the defendants. If you find that the statement differed in substantial respect from the truth, your finding will be for the plaintiff on this issue.

Members of the Jury, I would charge you that in connection with the libelous cause of action in this lawsuit you may consider only the written statement which was written on March 10, 1971, which is Exhibit number 22 in evidence.

However, to determine whether or not such alleged libel was malicious on the part of the defendant you may consider and examine all the evidence, both oral and written, as received during this entire trial.

In connection with the remaining causes of action, in this part of a lawsuit—that is between plaintiff Rupert and defendant Sellers—I will later in this charge instruct you as to the statements written and oral which you may consider in reaching a verdict.

Here the defendants claim that they were qualifiedly privileged in making the statements claimed by the plaintiff. A statement concerning a business, made by a person having an interest in or a duty with respect to such business to another person having a corresponding interest or duty is said to be privileged if made in good faith and in the belief that it is true. Even if a privileged statement is in fact false and defamatory, the person making the statement may not be held in damages unless in making the statement he acted maliciously. The burden of proving that statement was privileged is upon the defendant. But if he proves the statement to have been made on a privileged occasion it will be presumed until the contrary is proved that it was made in good faith, and then the burden is

upon the plaintiff to show that the statement was false, and in making the statement the defendant acted with malice.

The first question for you to determine, therefore, is whether the defendants' statement was made on a privileged occasion. The defendant claims that he was qualified by the Medical Economics Committee of the Monroe County Medical Association to analyze a proposal submitted by the plaintiff, and that as a result his comments were privileged. If you find that the defendant was not qualified to comment to the Medical Economics Committee on the proposal, then the occasion was not privileged, and you need not consider the question of privilege. If you find that the defendant has sustained his burden of proving that fact I charge you that the occasion was privileged, and your verdict must be for the defendant, unless you further find that the plaintiff has sustained his burden of proving that the statement was false and the defendant made the statements maliciously. A statement is made maliciously if it is made with deliberate intent to injure or wanton and reckless disregard of the truth, and its effect upon the person about whom it is made. The deliberate intent to injure exists when the statement is made with ill will, or with the knowledge or belief that it is false.

By reckless disregard of the truth is meant the making of a false statement under circumstances which suggest the probability that it is false and without any attempt to ascertain whether it is true or false.

In determining whether defendant made the statement maliciously you should consider the language in which the statement was phrased, and the manner in which it was used. If you find that the statement was made with ill will, or that it was false and that at the time he made it de-

fendant knew, or believed, it was false, your finding will be that he acted with deliberate intent to injure. If you find the statement was false and the defendant made it under circumstances which suggested the probability that it was false, and without any attempt to ascertain whether it was true or false, your finding may be that he acted in reckless disregard of the truth.

If your finding is that the defendants' statement was true, or that it was not made with deliberate intent to injure plaintiff, and was not made in reckless disregard of the truth, and its effect on the plaintiff, your verdict will be for the defendant. If you find that the defendants' statement was false, and that it was made with deliberate intent to injure plaintiff, or in reckless disregard of the truth, and its effect upon the plaintiff, your verdict will be for the plaintiff.

Now, the damages I have discussed with you so far are called compensatory. Because they are intended to compensate for such injury as you find was done to the plaintiffs' reputation and business. In addition, the plaintiffs ask that you allow them punitive damages. Punitive damages are allowed to punish a defendant who has acted maliciously, and to deter others from the commission of similar acts. A statement is made maliciously if it is made with deliberate intent to injure or wanton and reckless disregard of its truth, and its effect upon the person whom it is made. By wanton and reckless disregard of the truth is meant the making of a false statement under circumstances which suggest the probability that it is false, and without any attempt, or any proper attempt under the circumstances, to ascertain whether it was true or false.

If you find that in making statements about plaintiffs the defendant acted maliciously you may, but you are not

required to, award plaintiff punitive damages. The burden of proving that the defendant acted with malice is upon the plaintiff. In proof of malice plaintiff claims that the defendant published its statement without any reason to believe in their truth, and refused plaintiff's request that it cease making such statement. Defendant says that in publishing the statement he relied in good faith upon the information supplied to him. With respect to defendants' claim that it relied in good faith upon a trustworthy source, you should consider what was the source, whether defendant believed the source to be trustworthy, whether the source was such as to induce belief in the truth of the information received, whether the information defendant received from the source tended to establish the truth of the charge defendant made in his statements, whether defendants' statement accurately, fairly and completely stated the information received, and how thorough an investigation the defendant made of the facts set forth in the statement as published. If you find that defendants' source was not trustworthy, or that defendant did not rely upon the claimed source, or acted recklessly in relying upon a claimed source, or the information received by defendant did not intend to establish the truth of the charges defendant made, or that defendants' statements did not fairly, accurately and completely state the information received, you may, if on consideration of all of the evidence, you deem it proper to do so, find that the defendant acted with malice. If, however, you find that in publishing the statement defendant relied upon a trustworthy source, or did not act recklessly in relying on that source, and made a reasonable investigation of facts before publishing the statement, and that the statement as published fairly, accurately and completely reported the information received by defendant from the source, your finding will be that the defendant acted without malice.

If your finding is that defendants' statements were not made with deliberate intent to injure, were made not in reckless disregard of their truth, and their effect upon plaintiff, you may make no punitive damages award. If you find that in making the statements defendant was motivated by a deliberate intent to injure plaintiff or acted in reckless disregard of the truth, and the effect of the statements upon plaintiffs, you may award plaintiffs punitive damages.

Members of the Jury, my Charge to you on the law of damages must not be taken as an indication that you should find for the plaintiffs. It is for you to decide on the evidence presented, and the rules of law I have given you, whether the plaintiffs are entitled to recover from defendants. If you decide they are not entitled to recover you need go no further; your verdict will be for the defendants. Only if you decide that plaintiffs are entitled to recover will you consider the measure of damages.

If you find that plaintiffs are entitled to recover you will award them such amount as in the exercise of your good judgment and common sense you find is fair and just compensation for the injury to plaintiffs' reputation and business, and the humiliation and mental anguish in their public and private lives, which you find was directly and actually caused by the defendants' actions. In fixing that amount you should consider plaintiffs' standing in the community, the nature of defendants' charges against them, the extent to which the statement was circulated, the tendency of the statement to injure such a person as plaintiff, and all of the other facts and circumstances surrounding the parties. Such damages cannot be fixed with mathematical accuracy. Fair compensation may vary from nominal damages of one dollar, if you find the injury to have been negligible, to a substantial sum, if you find the injury to have been substantial.

Appendix E—Charge

Now, Members of the Jury, in another cause of action the plaintiffs claims that the defendant intentionally interfered with the contractual relations and business relations which the plaintiffs enjoyed. The law recognizes the wrong of intentional interference with contractual relations to constitute an actionable wrong. You must find, and here I would charge you that the plaintiffs have the burden of proof that defendants knew about the existence of a contract between the plaintiff and the Monroe County Medical Society, and their group, that defendant intentionally interfered with the contractual relationship without justification, that defendant made a representation of fact or facts to the Medical Society, and that same was, or were, untrue; that the defendants intended to deceive the Medical Society, and the Society believed and relied upon the statement, or statements, and was induced by it to replace the plaintiff as administrator and as a result plaintiff suffered damages.

The plaintiffs also claim that defendants interfered with the rights of the plaintiff possessed under contracts of insurance between the individual doctors of the Monroe County Medical Society and the Continental Insurance Company. Plaintiffs claim that defendants further knew about these contracts and intentionally interfered with the same, resulting in damages to the plaintiff.

Now, it is not necessary that the plaintiffs be a party to the contract. It is sufficient that the plaintiff possesses rights under the contract interfered with. For example, the relationship between an insurance company and a policyholder is contractual. An insurance broker earns his commissions when he brings about a relationship of insuror and insured, when he arranges the sale of a policy from the company to a policyholder.

The plaintiffs claim that the defendants intentionally caused the Monroe County Medical Society to terminate

its relationship with the plaintiffs, and that the defendants thus intentionally destroyed the plaintiffs' right to earn commissions on the sale of group insurance policies to the members of the Monroe County Medical Society. If you believe that any of the aforementioned claimed contracts existed, and if so that defendant knew of them, and further that defendants intentionally interfered with any of these relationships, without any justification, and finally that the plaintiffs suffered damages because of this incident, you may find for the plaintiffs and award damages.

Now, the damages which I have just discussed with you are called special damages, which I have heretofore explained to you.

In addition, plaintiffs ask that you allow them punitive damages. Punitive damages, as I have advised you, are allowed to punish a defendant who has acted maliciously and to deter others from the commission of similar acts. A statement is made maliciously if it is made with deliberate intent to injure or wanton and reckless disregard of its truth, and its effect upon the person about whom it is made. By wanton and reckless disregard of the truth is meant the making of a false statement under circumstances which suggest the probability that it is false and without any attempt, or any proper attempt, under the circumstances to ascertain whether it was true or false. If you find that in making the statements about plaintiffs the defendants acted maliciously, you may, but you are not required to, award plaintiffs punitive damages. The burden of proving that the defendant acted with malice is upon the plaintiff. In proof of malice plaintiff claims that the defendant published its statements, written and oral, without any reason to believe in their truth. Defendant says that in publishing the written and oral statements he relied in good faith upon the information supplied to him. In

connection with the defendants' claim that it relied in good faith upon a trustworthy source, you should consider what was the source, whether defendant believed the source to be trustworthy, whether the source was such as to induce belief in the truth of the information received, whether the information defendant received from the source tended to establish the truth, of charges defendant made in his statements, whether defendants' statement fairly, accurately and completely stated the information received, and how thorough an investigation defendant made of the facts set forth in the written and oral statements published.

If you find that defendants' source was not trustworthy or that defendant did not rely upon the claimed source, or acted recklessly in relying upon a claimed source, or that the information received by the defendant did not intend to establish the truth of the charges defendant made, or that defendants' statements did not fairly, accurately and completely state the information received, you may, if on consideration of all of the evidence you deem it proper to do so, find that the defendant acted with malice. If, however, you find that in publishing statements defendant relied upon a trustworthy source, or did not act recklessly in relying on that source, and made a reasonable investigation of the facts before publishing the statements, written or oral, and that the statements as published fairly and accurately and completely reported the information received by defendant, from the source, your finding will be that the defendant acted without malice. If your finding is that defendants' statements were not made in deliberate intent to injure, were not made in reckless disregard of their truth, and their effect upon the plaintiff, you may make no award of punitive damages. If you find that in making the written and oral statements defendant was motivated by a deliberate intent to injure plaintiffs, or

acted in reckless disregard of the truth, and the effect of the statements upon plaintiffs, you may award plaintiffs punitive damages.

Now, Members of the Jury the plaintiff claims that the defendant Charles J. Sellers, Jr. in acting as an insurance consultant or adviser to the Monroe County Medical Society was acting as such in violation of the Insurance Law. Mr. Sellers claims that he was a licensed insurance broker, and was therefore entitled to act as a consultant.

Now, the Court will read to you the sections which it deems pertinent to this situation.

Section 180, subdivision 6 of the New York State Insurance Law reads as follows:

> "Every person, partnership, association or corporation whether located within or located within or without this state, who or which inspects risks, adjusts losses, tests appliances, formulates rules, establishes standards, or assists in the making of rates for the information or benfit of insurers or rating organizations in the transacting of insurance business on property or risks located in this state, or furnishes information or advice to insurers or prospective insurers, shall be known as a service or an advisory organization. Nothing herein contained shall apply to an attorney at law, to a licensed broker, or to a licensed insurance agent other than one who performs such services pursuant to a special contract with an insured or prospective insured."

Section 182 of the New York State Insurance Law, subdivision 1 reads as follows:

> "Every service or advisory organization shall file with the superintendent a copy of its constitution,

> articles of agreement or association, or of incorporation, and the by-laws and all amendments thereto, under which it operates or poses to operate, and such other information as the superintendent may require. Service or advisory organizations shall be subject to examination by the superintendent, as often as he may deem it expedient."

If you find, Members of the Jury, that Mr. Sellers was an insurance broker, then he was not required to register further and was entitled to act as a consultant.

In another cause of action, the plaintiffs further claim that defendants in violation of Section 127 of the New York State Insurance Law circulated statements misrepresenting the terms, benefits or advantages of various insurance programs and policies offered by plaintiffs to the members of the Monroe County Medical Society as a result of which the Monroe County Medical Society terminated plaintiff as administrator of its group health insurance program. Defendants deny such claim.

I will now read to you pertinent sections of the Insurance Law which I believe you should be informed of.

Section 272 of the New York State Insurance Law reads as follows. Title: "Unfair methods of competition or unfair and deceptive acts or practices prohibited

> "No person shall engage in this state in any trade practice which is defined in this article as or determined pursuant to this article to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance."

Subdivision 273, pertinent parts thereof: "Unfair methods of competition and unfair or deceptive acts or practices defined

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> "The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance: The commission of any one or more of the acts prohibited . . .—"

And Section 40-c—the Court has determined is the only section involved with this trial—Section 40-c of the New York State Insurance Law reads as follows: "False statements or rumors as to insurance institutions

> "Any person who willfully and knowingly makes, circulates or transmits to another or others any statement, or rumor, written, printed or by word of mouth, which is untrue in fact and is directly or by inference derogatory to the financial condition or affects the solvency or financial standing of any insurance corporation or other insurer doing business in this state, or knowingly counsels, aids, procures, or induces another to start, transmit or circulate any such statement or rumor, is guilty of a misdemeanor."

Section 127 of the Insurance Law, subdivisions 1, 2, 3 and 4 read as follows:

> "Misrepresentations, misleading statements and incomplete comparisons"
>
> Subdivision 1: "No agent or representative of any insurer authorized to transact the business of life, accident or health insurance in this state and no insurance broker, and no other person, firm, association or corporation, shall issue or circulate or cause or permit to be issued or circulated, any illustration, circular, statement or memorandum misrepresenting the terms, benefits or advantages of any policy or contract of life, accident or health insurance delivered or issued for delivery or to be delivered or

issued for delivery, in this state, or shall make any misleading estimate as to the dividends or share of surplus to be received in the future on such policy or contract, or shall make any false or misleading statement as to the dividends or share of surplus previously paid by any such insurer on similar policies or contracts, or shall make any misleading representation, or any misrepresentation, as to the financial condition of any insurer, or as to the legal reserve system upon which such insurer operates. No such person, firm, association or corporation shall make to any person or persons any incomplete comparison of any such policies or contracts of any insurer or insurers, for the purpose of inducing, or tending to induce, such person or persons to lapse, forfeit or surrender any insurance policy or contract."

Subdivision 2: "Any comparison of the policies or contracts of any such insurer or insurers, shall be deemed to be an incomplete comparison, if it does not compare in detail the gross premiums and gross premiums less any dividend or other reduction thereof allowed by the insurer or insurers, at the date of the comparison, and the increase in any cash values and all the benefits provided by each of such policies or contracts for the possible duration of the policy or contract to be determined by the life expectancy of the policyholder. The omission from any comparison of any benefit or value provided in any such policies or contracts or of any differences as to amount or period of payment of premiums, or of any differences in limitations or conditions or provisions which directly or indirectly affect the benefits thereunder, shall constitute such comparison an incomplete comparison."

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Subdivision 3: "In the determination, judicial or otherwise, of the incompleteness or misleading character of any such comparison, it shall . . . be presumed that the insured knew or knows of any of the provisions—it shall not be presumed that the insurer (insured) knew or knows of any of the provisions, terms or benefits contained in any insurance policy or contract."

Subvision 4: "Any agent or representative of an insurer, any insurance broker and any other person, firm, association or corporation who, or which, shall violate any of the provisions of this section shall be guilty of a misdemeanor, unless the same constitutes a felony. Any such agent, representative, broker, person, firm, association or corporation who, or which, shall knowingly receive any compensation or commission for the sale of any insurance policy or annuity contract induced by a violation of this section shall also be liable for a civil penalty in the amount received by such violator as compensation or commission, which penalty may be sued for and recovered for his own use and benefit by any person induced to purchase an insurance policy or annuity contract by such violation. In addition, such agent, representative, broker, person, firm, association or corporation violating this section shall be liable for a civil penalty in the amount of any compensation or commission lost by any agent, representative or broker as a result of a violation of this section or the making of such false or misleading statement, which penalty may be sued for and recovered for his own use and benefit by such agent, representative or broker."

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Now, Section 127 of the Insurance Law provides that a person violating that section be liable for a civil penalty in the amount of any commission by an agent, by any agent, as a result of a violation of this section, or the making of such false or misleading statement, which penalty may be sued for and recovered by the agent or broker.

The burden is on the plaintiffs to show that the defendants circulated such statements and violated the law, which I have just read to you. And if you find that the Monroe County Medical Society terminated plaintiff as administrator of its group health insurance plan as a result of those statements you will find for the plaintiffs. And if you so find the Court will impose the penalty as provided by the statute.

You will recall that I previously charged you, so far as the libel cause of action was concerned, that you could consider only that evidence received of the written statement occurring on March 10, 1971, Exhibit 22 in evidence. Now I will charge you in connection with the evidence in this lawsuit whether written or oral so far as the causes of action, intentional interference with contractual and business relations, and violation of the New York State Insurance Law, are concerned, you may consider all of the evidence received in this lawsuit, oral and written, as well as any other evidence received in making your determination in connection with these two causes of action.

Testimony has been introduced that the plaintiffs gave to the Witness Mac James Beckwith an indemnification agreement, offering to indemnify Mr. Beckwith for any damages recovered against him, providing he would not testify at this trial. This indemnity agreement, and letter of transmittal, were received in evidence during this trial. The plaintiffs readily admitted the existence of the indemnity agreement, as well as the letter transmitting it, to

Mr. Beckwith's attorney. Now, where there is no dispute that such indemnification agreement was offered to Mr. Beckwith, now there is no dispute as same is offered, and you will consider the weight to be given to it. In making that determination you will take into consideration plaintiffs' explanation of the agreement and letter, and all of the facts and circumstances concerning it that are in evidence. Such an offer may be considered by you as an admission by plaintiff that plaintiffs' case is weak. It tends to discredit his witness and casts doubts upon his position. That such an offer was made does not, however, mean that the opposing party, defendant, is entitled to a verdict. For plaintiff may have thought he had a bad case, when in fact he had a good one. The fact that such offer was made, you will give that fact such weight as you think proper under all of the circumstances. You may consider it to be conclusive with respect to plaintiffs' claim. You may ignore it altogether, or you may attribute to it a weight between these extremes.

Members of the Jury, in this part of this lawsuit wherein Charles J. Sellers, Jr. and Charles J. Sellers & Company, Inc. are the plaintiffs, and Philip D. Rupert, Jr., and Rupert & Lutz Agency, Inc. are defendants, this is an action to recover damages for libel, as I have previously advised you. A libel is a publication in writing which tends to disgrace or discredit a person in the community.

The plaintiffs Charles J. Sellers, Jr. and Charles J. Sellers & Company, Inc. claim that defendants Philip D. Rupert, Jr. and Rupert & Lutz Agency, Inc. wrote a letter dated November 16, 1971 to Robert C. McVeigh, M.D., President of the Monroe County Medical Society. That letter is in evidence, and before you, and being Exhibit U and U-1.

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If a publication charges a professional person with incompetency, damages may be recovered without showing that the publication caused any specific financial loss to the plaintiff. If you find that the letter of the defendants as understood by those who received it, and read it, did disgrace or discredit them in the community your verdict will be for the plaintiff Charles J. Sellers, Jr. and Charles J. Sellers & Company, Inc. If you find that the letter did not disgrace or discredit them in the community, then your verdict will be for the defendants.

The defendants contend that the written statements are true, and were published without malice and were made in self-defense, in rebuttal to the certain defamatory matter, both written and oral, concerning the defendants, made by the plaintiff to members of the Monroe County Medical Society at meetings of the Economics Committee held on February 2nd, 1971, and a letter of March 10, 1971, and were made in the interest of the Monroe County Medical Society.

Truth is a complete defense in an action for defamation no matter how injurious the publication. The burden is upon the defendant to prove by a fair preponderance of the credible evidence, as I have defined that term for you, that at the time the statements were made they were true. To establish a defense of truth, defendant must prove that each statement was true. It is not sufficient that a part of the statement was true. This does not mean, however, that every word in every sentence need be proved true. Variances in immaterial particulars may be disregarded. The test is whether the statement as published would have a different effect on the mind of the reader than the truth would have produced.

You will determine from the evidence presented what the truth was, and compare that with the written state-

ments which you find were made by the defendants, taking those statements according to the ordinary meaning of the language used. If you find that there was no substantial difference between the statements and the truth, your verdict will be for the defendants. If you find that the statements differed in substantial respect from the truth your finding will be for the plaintiffs on that issue.

Now, Members of the Jury, I would charge you that in connection with the libel cause of action Charles J. Sellers, Jr. and Charles J. Sellers & Company, Inc. plaintiff against Philip D. Rupert, Jr. and Rupert & Lutz Agency, Inc., defendants, you may consider the written statement, letter dated November 16, 1971, addressed to Robert C. McVeigh, M.D., and such evidence as presented to you by the respective parties in connection therewith.

In this part of the lawsuit wherein Philip D. Rupert, Jr. and Rupert & Lutz are defendants, they claim they were privileged. The defendants claim that the letter which plaintiff Sellers and his company claim is defamatory was made in reply to the earlier statements of Mr. Sellers. Now one is privileged to defend himself from a defamatory attack. If you find that this letter was a reply to Mr. Sellers' earlier statements, and if you find that Mr. Sellers' statements were defamatory of the Rupert & Lutz people, than I charge you that the Rupert & Lutz letter is privileged, as I have heretofore advised you concerning privilege, and will not give rise to a damage award unless Mr. Sellers has proven to your satisfaction that Rupert & Lutz published the letter maliciously, as I have herein before defined maliciously for you, and that its contents were false and that they defamed Mr. Sellers and his company, and that they suffered injury therefrom. If you find that the letter was privileged, and that Mr. Sellers has not proven malice, your verdict in this cause of action will be

for the defendants Ruperts. If you find that this letter was not a reply to earlier alleged defamations by Mr. Sellers, or if you find that the letter was published with actual malice, then you may find for the plaintiff, Mr. Sellers, and company, on their cause of action.

In respect to the privilege claimed by the defendants. You may consider all of the evidence, written and oral, received in this lawsuit, in your determination of malice, as to whether or not defendants acted with malice.

In the action wherein Charles J. Sellers, Jr. and Charles J. Sellers & Company, Inc. are plaintiffs, and Philip D. Rupert, Jr., and Rupert & Lutz Agency are defendants, the damages I have discussed with you so far are called compensatory damages, because they are intended to compensate for such injury as you find was done to the plaintiffs' reputation and business.

In addition, plaintiffs ask that you allow them punitive damages. Punitive damages are allowed to punish a defendant who has acted maliciously and to deter others from the commission of similar acts. Now, Members of the Jury, I know this repeats itself, but there are two separate causes of action here, and I thought it would be clearer to split them up that way so that you would know without any question. A statement is made with malice if it is made with deliberate intent to injure or wanton and reckless disregard of its truth, and its effect upon the person about whom it was made. By wanton and reckless disregard of the truth is meant the making of a false statement under circumstances which suggest the probability that it is false and without any attempt, or any proper attempt, under the circumstances, to ascertain whether it was true or false.

If you find that in making the statements about plaintiffs the defendants acted maliciously, you may, but you are not required to, award plaintiffs punitive damages.

Appendix E—Charge

The burden of proving that the defendant acted with malice is upon the plaintiffs. In proof of malice plaintiffs claim that defendants published statements, its statements, without any reason to believe in their truth and refused plaintiffs' request that it cease making such statements. Defendant says that in publishing the statements he relied in good faith upon information supplied to him. With respect to defendants' claim that it relied in good faith upon a trustworthy source you should consider what was the source and whether defendant believed the source to be trustworthy, whether the source was such as to induce belief in the truth of the information he received, and whether the information defendant received from the source tended to establish the truth of the charge defendant made in his statements, whether defendants' statement fairly and accurately and completely stated the information received, and how thorough an investigation the defendant made of the facts set forth in the statements is published.

If you find that defendants' source was not trustworthy, or that defendant did not rely upon the claimed source or acted recklessly in relying upon the claimed source, or that the information received by defendant did not intend to establish the truth of the charges defendant made, or that defendants' statements did not fairly, accurately and completely state the information received, you may, if on consideration of all of the evidence you deem it proper to do so, find that the defendant acted with malice. If, however, you find that in publishing the statement defendant relied upon a trustworthy source—

Mr. Murty: Your Honor, I believe that is the plaintiff.

The Court: Did I say if however you find that in publishing the statement the defendant?

Mr. Murty: The plaintiff is the one I believe published the statements in this case, in this instance.

The Court: Plaintiff relied. You are correct, counselor. Strike that. If, however, you find that in publishing the statement plaintiff relied upon the trustworthy source, or did not act recklessly in relying on that source, and made a reasonable investigation of the facts, before publishing the statements, and that the statements as published fairly and accurately, completely reported the information received by plaintiff from the source, your finding will be that the plaintiff acted without malice.

If your finding is that defendants—Counsel, I think we will have a short recess.

We are going to have a short recess, Members of the Jury. Again, I would advise you and admonish you not to discuss the case among yourselves nor with others until it is finally submitted to you.

I will see counsel in chambers.

(Short recess taken.)

The Court: Do not bring the jury in yet.

Counselors, I found the spot where Mr. Murty corrected me, which was wrong. It goes back to, "If, however, you find that in publishing the statement defendant relied upon a trustworthy source—" and you indicated it should be plaintiff. It is defendant Rupert. So I will start in continuing the Charge. Any objection?

Mr. Hartman: No objection.

The Court: That is with the consent of both counsel?

Mr. Murty: Yes.

(Jury returns to the jury box.)

The Court: Do you waive polling, gentlemen?

Mr. Hartman: Yes.

Mr. Murty: Yes.

The Court: I realize, Members of the Jury, it is a little confusing when you have plaintiffs on each side of the

picture and defendants. I tried to keep these actions separated so that you would understand each side of the picture. I am going back just a short ways to pick up where I had been corrected, which I was right, and it was nobody's fault, really. Now, I will continue the charge then at that spot.

If, however, you find that in publishing a statement defendants relied upon a trustworthy source, or did not act recklessly in relying on that source, and made a reasonable investigation of the facts before publishing the statements, and that the statements as published fairly, accurately and completely reported the information received by defendants, from the source, your finding will be that the defendants acted without malice. If your finding is that the defendants' statements were not made with deliberate intent to injure, were not made in reckless disregard of their truth and their effect upon the plaintiffs, you may make no award for punitive damages. If you find that in making the statements defendant was motivated by a deliberate intent to injure plaintiff, or acted in reckless disregard of the truth, and the effect of the statements upon the plaintiffs, you may award plaintiffs punitive damages.

My Charge to you on the law of damages in respect to the Charles J. Sellers, Jr. and Charles J. Sellers & Company, Inc. action must not be taken as an indication that you should find for the plaintiffs. It is for you to decide on the evidence presented, and the rules of law I have given to you, whether the plaintiffs are entitled to recover from defendants. If you decide they are not entitled to recover, you need go no further. Your verdict will be for the defendants. Only if you decide the plaintiffs are entitled to recover will you consider the measure of damages.

Appendix E—Charge

If you find that plaintiffs are entitled to recover you will award them such amount as in the exercise of your good judgment and common sense you find is fair and just compensation for the injury to plaintiffs' reputation and business, and the humiliation and mental anguish in their public and private lives which you find was directly and actually caused by the defendants' actions. In fixing that amount you should consider plaintiffs' standing in the community, the nature of defendants' charges against them, the extent to which the statements were circulated, the tendency of the statement to injure such a person as plaintiffs, and all of the other facts and circumstances surrounding the parties. Such damages cannot be fixed with mathematical accuracy. Fair compensation may vary from nominal damages of one dollar, if you find the injury to have been negligible, to a substantial sum if you find the injury to have been substantial.

I have not attempted to review this evidence in detail, but only to point out briefly the claims of the respective parties. Because you are the sole judges of the facts and the credibility and believability of the witnesses. It is your duty to determine what happened. In determining the facts, however, your conclusions must be based upon the evidence presented here at the trial, drawing such conclusions from the testimony as to your minds seem reasonable and probable. In making the factual determination on which your verdict will be based, you may consider only the exhibits which have been admitted in evidence, and the testimony of the witnesses as you have heard it in this courtroom, and as there has been read to you testimony given on examination before trial. Under our rules of practice an examination before trial is taken under oath, and is entitled to equal consideration by you, notwithstanding the fact that it was taken prior to the trial and

outside the courtroom. However, arguments, remarks, and summations of the opposing attorneys are not evidence, nor is anything that I now say, or may have said, or will say, with regard to the facts, evidence.

In arriving at the credibility of the witnesses you will take into consideration their appearance on the witness stand, their manner of testimony, their candor, truthfulness, straightforwardness, or the lack thereof as the case may be; their interest if any, or lack of interest, in the outcome of the case; their relationship to the parties; the reasonableness or unreasonabless of their testimony, and anything else which from your experience may be helpful to you. Because their degree of credibility, as I have said before, is entirely in your hands. The plaintiff Philip D. Rupert, Jr., and the defendant Charles J. Sellers, respectively each testified before you in respect to each of their cases. As parties to the action they are interested witnesses. That a witness is interested in the outcome of the case does not mean that he has not told the truth. It is for you to determine from demeanor on the stand, and such other tests as your experience dictates, whether or not his interest is such that he is likely, unintentionally or otherwise, to color his testimony. You are at liberty, if you deem it proper under all of the circumstances to do so, to disbelieve the testimony of such a witness, even though it is not impeached or contradicted. However, you are not required to disbelieve such a witness, and may accept all or such part of his testimony as you deem reliable, and reject such part as you deem unworthy of acceptance. I might say that if you believe that any witness has willfully sworn falsely to any material fact, then under those circumstances you may disregard any or all the testimony of that witness on that particular fact. You may further, although you are not required to,

disregard the entire testimony of any such witness unless his other testimony is corroborated by some other credible witness, or some other fact or circumstance in the case.

You will recall that the witness Robert M. Morrison, Charles J. Clauss and Robert Noonan, all gave testimony concerning their qualifications as an expert in the field of insurance business appraisals and income tax.

When a case involves a matter of science or art requiring special skill or knowledge ordinarily not possessed by the average person an expert is permitted to state his opinion for the information of the Court and jury. The opinion stated by each expert who testified before you was based on particular facts as the expert himself observed them, and testified to them before you, or as the attorney who questioned him asked him to assume. You may reject an expert's opinion if you find the facts to be different from those which formed the basis of opinion. You may also reject his opinion if, after careful consideration of all of the evidence in the case, expert and other, you disagree with the opinion. In other words, you are not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony. Such an opinion is subject to the same rules concerning reliability as the testimony of any other witness. It is given to assist you in reaching a proper conclusion. It is entitled to such weight as you find the expert's qualifications in his field warrant and must be considered by you, but is not controlling upon your judgment.

I must also say that there is no mathematical yardstick of any kind that can be used generally in arriving at the amount of verdict, if in fact you decide that the respective plaintiffs are entitled to a verdict. That is what jurors are for. It is for you to determine from your own sound com-

mon sense if the respective parties are entitled to a verdict, what the amount of that verdict should be.

May I say that if anything I have said to you in reference to any of the facts in this case does not correspond with your own recollection, or if anything that either counsel may have said in their summations does not correspond with your recollection, it is your own recollection of what the evidence is that must govern, because as I have said before, you, the jury, are the sole judges of the facts.

I need hardly tell you that in passing upon the facts of this case you are not to be influenced in your determination by sympathy, bias, or prejudice of any kind. You have been drawn here to be a part of this court in the administration of justice. This case is important to both of these parties. Your proper determination of the issues here involved is important not only to these parties but to your entire system in the administration of justice. You must give this case your conscientious, careful, honest and unbiased consideration in accordance with the oaths which you have all taken.

Now as to the forms of verdict you may render in the lawsuit wherein Philip D. Rupert, Jr., is plaintiff and Charles J. Sellers, Jr. and Charles J. Sellers & Company, Inc. are defendants, according to my instructions as to the libel cause of action you may find a verdict in favor of the plaintiff, Philip D. Rupert, Jr., and against the defendants, Charles J. Sellers, Jr., and Charles J. Sellers & Company, Inc. as to special damages, and special damages are defined as losses caused by defendants' behavior, in the amount of so many dollars. Or

You may find a verdict in favor of the defendants, Charles J. Sellers & Company, Inc., and against the plaintiff, Philip D. Rupert, Jr. as to special damages of no cause of action. And

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You may find a verdict in favor of the plaintiff, Philip D. Rupert, Jr. and against the defendants, Charles J. Sellers, Jr., and Charles J. Sellers & Company, Inc., as to general damages which are defined as damages to compensate an injured party for injury to his or its personal or business reputation in the community and for the humiliation and mental anguish to their public and private lives which you find was directly and actually caused by the defendants' behavior, in the amount of so many dollars. Or

You may find a verdict in favor of the defendants Charles J. Sellers, Jr., and Charles J. Sellers & Company, Inc., and against the plaintiff Philip D. Rupert, Jr., as to general damages of no cause of action. And

You may find a verdict in favor of the plaintiff, Philip D. Rupert, Jr. and against the defendants, Charles J. Sellers, Jr., and Charles J. Sellers & Company, Inc., finding that you award Philip D. Rupert, Jr. punitive damages, which are defined by the malicious behavior of the defendant who has acted with ill will or in reckless disregard of the truth and that their acts injured the plaintiff, but you will not at this time fix an amount of such damages. A separate hearing will be held for you to make such a monetary determination. Or

You may find a verdict in favor of the defendants Charles J. Sellers, Jr., and Charles J. Sellers & Company, Inc., and against the plaintiff, Philip D. Rupert, Jr., as to punitive damages of no cause of action. And

As to your form of verdict you may render wherein Rupert & Lutz Agency, Inc., are plaintiffs and Charles J. Sellers, Jr., and Charles J. Sellers & Company, Inc., are defendants, according to my instructions, you may find a verdict in favor of plaintiff, Rupert & Lutz Agency, Inc., and against defendants Charles J. Sellers, Jr., and Charles

J. Sellers & Company, Inc., as to special damages, which I have heretofore defined for you, in the amount of so many dollars. Or

You may find a verdict in favor of the defendants, Charles J. Sellers, Jr., and Charles J. Sellers & Company, Inc., and against the plaintiff Rupert & Lutz Agency, Inc., as to special damages of no cause of action. And

You may find a verdict in favor of the plaintiff Rupert & Lutz Agency, Inc., and against the defendants, Charles J. Sellers and Charles J. Sellers & Company, Inc., as to general damages which I have heretofore defined for you in the amount of so many dollars. Or

You may find a verdict in favor of the defendants, Charles J. Sellers, Jr., and Charles J. Sellers & Company, Inc., and against the plaintiff Rupert & Lutz Agency, Inc., as to general damages of no cause of action. And

You may find a verdict in favor of the plaintiff, Rupert & Lutz Agency, Inc., and against the defendants, Charles J. Sellers, Jr., and Charles J. Sellers & Company, Inc., finding that you award plaintiff Rupert & Lutz Agency, Inc., punitive damages, as I have previously defined for you, but you will not at this time fix an amount. A separate hearing will be held for you to make such a monetary determination. Or

You may find a verdict in favor of the defendants, Charles J. Sellers, Jr., and Charles J. Sellers & Company, Inc., and against the plaintiff Rupert & Lutz Agency, Inc., as to punitive damages of no cause of action. And

You may make a finding that the defendants, Charles J. Sellers, Jr., and Charles J. Sellers & Company, Inc., violated Section 127 of the New York State Insurance Law by misrepresenting the terms of any of the insurance policies in evidence. And

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Your verdict may be for the plaintiff, Rupert & Lutz Agency, Inc., in this cause of action and the Court will set the penalty prescribed by law. Or

You may make a finding that the defendant, Charles J. Sellers, Jr. and Charles J. Sellers & Company, Inc., did not violate Section 127 of the New York State Insurance Law and your verdict will be for the defendants, Charles J. Sellers, Jr., and Charles J. Sellers & Company, Inc., of no cause of action. And

As to the form of your verdict you may render in the intentional interference with contractual and business relation cause of action, you may find a verdict in favor of the plaintiff, Philip D. Rupert, Jr. and against the defendants Charles J. Sellers, Jr., and Charles J. Sellers & Company, Inc., in the amount of so many dollars. Or

You may find a verdict in favor of the defendants Charles J. Sellers, Jr. and Charles J. Sellers & Company, Inc. against the plaintiff, Philip D. Rupert, Jr., of no cause of action. And

You may find a verdict in favor of the plaintiff, Philip D. Rupert, Jr., and against the defendants, Charles J. Sellers, Jr. and Charles J. Sellers & Company, Inc., finding that you award Philip D. Rupert, Jr., punitive damages which are defined by the malicious behavior of the defendant who has acted with ill will or in reckless disregard of the truth and that their acts injured the plaintiff, but you will not at this time fix an amount of such damages. A separate hearing will be held for you to award monetary determination. Or

You may find a verdict in favor of the defendants, Charles J. Sellers, Jr., and Charles J. Sellers & Company, Inc., and against the plaintiff, Philip D. Rupert, Jr., of no cause of action. And

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You may find a verdict in favor of the plaintiff, Rupert & Lutz Agency, Inc., and against the defendants, Charles J. Sellers, Jr. and Charles J. Sellers & Company, Inc., of so many dollars. Or

You may find a verdict in favor of the defendants Charles J. Sellers, Jr. and Charles J. Sellers & Company, Inc., and against the plaintiff Rupert & Lutz Agency, Inc. of no cause of action. Or

You may find a verdict in favor of the plaintiff, Rupert & Lutz Agency, Inc., and against the defendants, Charles J. Sellers, Jr. and Charles J. Sellers & Company, Inc., finding that you award Rupert & Lutz Agency, Inc. punitive damages, which are defined by the malicious behavior of the defendant who has acted with ill will or in reckless disregard of the truth, and that their acts injured the plaintiff, but you will not at this time fix an amount of such damages. A separate hearing will be held for you to make such a monetary determination. Or

You may find a verdict in favor of the defendants Charles J. Sellers, Jr. and Charles J. Sellers & Company, Inc., and against the plaintiff, Philip D. Rupert, Jr., of no cause of action. And

As to the form of your verdict you may render in the lawsuit wherein Charles J. Sellers, Jr. and Charles J. Sellers & Company, Inc. are plaintiffs and Philip D. Rupert, Jr. and Rupert & Lutz Agency, Inc. are defendants, according to my instruction as to the libel cause of action, you may find a verdict in favor of the plaintiff Charles J. Sellers, Jr. and against the defendants, Philip D. Rupert, Jr., and Rupert & Lutz Agency, Inc., as to general damages, and as I have previously defined for you, in the amount of so many dollars. Or

You may find a verdict in favor of the defendants, Phillip D. Rupert, Jr., and Rupert & Lutz Agency, Inc., and against plaintiffs Charles J. Sellers, Jr., and Charles J. Sellers & Company, Inc. as to general damages of no cause of action. And

You may find a verdict in favor of plaintiff Charles J. Sellers, Jr. and against the defendants, Philip D. Rupert, Jr. and Rupert & Lutz Agency, Inc., finding that you award plaintiff, Charles J. Sellers, Jr., punitive damages, which has been previously defined for you, but you will not at this time fix an amount. A separate hearing will be held for such a monetary determination. Or

You may find a verdict in favor of the defendants, Philip D. Rupert, Jr. and Rupert & Lutz Agency, Inc. and against the plaintiff, Charles J. Sellers, Jr., and Charles J. Sellers & Company, Inc., as to punitive damages of no cause of action. And

You may find a verdict in favor of plaintiff, Charles J. Sellers & Company, Inc. and against the defendants, Philip D. Rupert, Jr., and Rupert & Lutz Agency, Inc., as to general damages as I have previously defined for you in the amount of so many dollars. Or

You may find a verdict in favor of the defendants, Phillip D. Rupert, Jr., and Rupert & Lutz Agency, Inc., and against the plaintiffs, Charles J. Sellers, Jr. and Charles J. Sellers & Company, Inc., as to general damages of no cause of action. And

You may find a verdict in favor of plaintiff, Charles J. Sellers & Company, Inc., and against the defendants, Philip D. Rupert, Jr., and Rupert & Lutz Agency, Inc., finding that you award plaintiff Charles J. Sellers & Company, Inc., punitive damages as I have defined same for you, but you will not at this time fix an amount. A separate hearing will be held for such monetary determination. Or

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You may find a verdict in favor of the defendants, Philip D. Rupert, Jr., and Rupert & Lutz Agency, Inc., and against the plaintiff, Charles J. Sellers & Company, Inc., as to punitive damages of no cause of action.

Now, Members of the Jury, the order in which I have set forth the possible verdicts you may render in this lawsuit is not intended, and should not in any way indicate to you the verdict which you will render. If in the course of your deliberations your recollection of any part of the testimony should fail, or you should find yourself in doubt concerning my instructions to you on the law, it is your privilege, if you so desire, to return to the courtroom for the purpose of having such testimony or instructions read to you. When you retire to the jury room you may choose any one of your number to serve as foreman to preside over your deliberations and to report your verdicts. In order to arrive at a verdict five or more of your number must agree. Try to be unanimous, but if you cannot when five of your number have agreed upon a verdict just notify the officer in attendance.

Now, Members of the Jury, take this case and do real justice between these parties.

APPENDIX F

Exceptions to Charge

Incidentally, Members of the Jury, I have a printed form of the possible verdicts you may render, which I am going to have delivered to you while you are deliberating.

Are there any requests to charge, gentlemen?

Mr. Hartman: No request, Your Honor.

Mr. Murty: I have exceptions.

The Court: Do you want your exceptions out of the presence of the jury?

(No response.)

The Court: All right. I assume that you want the jurors to have all the exhibits they deem necessary and make them available for that?

Mr. Hartman: They will be here.

The Court: The jury will retire to deliberate, except number seven. I am going to keep the alternate around.

Mr. Hartman: I think so.

The Court: Yes. Because we do have another part possible. Inasmuch as we have gone this long in the lawsuit, I will keep her around.

(Attendants sworn.)

(Jury retires.)

The Court: All right, counselor. You have some exceptions. Present them.

Mr. Murty: Yes, Your Honor. I would like to except to a part of the charge. I take exception to the failure to

charge on "opinion" as concerns defamation as set forth in my request to charge to the Court.

Perhaps I ought to have these marked. Or is that necessary?

The Court: It is up to you, counselor.

Mr. Murty: I will ask to have my proposed instructions marked so that we may—

Mr. Hartman: They are not marked in evidence.

Mr. Murty: No, just marked for identification.

The Court: They are not received.

Off the record.

(Discussion had off the record.)

(Whereupon, defendants' Exhibit PP, request to charge, was marked for identification by the reporter.)

(Whereupon, defendants' Exhibit QQ, request to charge, was marked for identification by the reporter.)

Mr. Murty: I except to the Charge the failure—or the failure to charge on the basis opinion as a defense as outlined in my brief and in my requests to charge.

I also except to the Court charging punitive damages as to the cause of action for interference with contract, for the reasons stated in my brief.

I except to the failure of the Court to charge justification under the tortious interference with contract cause of action, as called for in the case of Terry versus The Dairymen's League and in the form set forth in my request to charge, Exhibit PP, which the Court had before it.

I further except to the charge, Section 40-c, under Section 272. I must say I was surprised. That section relates to insurance corporations, and other insurers under the insurance law, and there is no evidence of any false statements or rumors as to any such insurer or insurance corporation.

In the Bill of Particulars the only such—the claim was alleged that Rupert & Lutz was a corporation, which it obviously is not.

I object to the Charge—

The Court: You mean you except?

Mr. Murty: I except to the Charge—

The Court: All right. You said you object. I didn't know—

Mr. Murty: I except to the Charge that the jury may consider all acts occurring at any time in connection with the tortious interference of contract, or cause of action, and except to their being allowed to consider acts subsequent to March 23rd.

I except to the failure to charge that Richard Gates was an interested party in view of the fact that he was a party-defendant at the time he testified, and I believe that I should be entitled to such a charge on that basis.

The Court: All your exceptions are noted on the record.

Mr. Murty: Thank you, Your Honor.

The Court: We will be in recess pending the return of the jury. I will let the jury have until about 5:30.

Mr. Hartman: As late as you want, as far as I am concerned. We can be here a long time. I would hang around. I don't care.

(Whereupon, at 4:07 p.m. a recess was taken pending the return of the jury.)

* * * * *

4:27 p.m.

(Jury not present.)

The Court: On the record. As the Court understands it, Exhibit M is missing, and the respective counsel are willing to agree, or stipulate, that the copy which we now have

before us is an exact copy of Exhibit M, and that it may be marked Exhibit M accordingly and given to the jury.

Mr. Hartman: So stipulated.

Mr. Murty: Your Honor, I would also like to take a further exception to your charge on the ground that it appears that it was not made clear to the jury that they must find that a libel had occurred before they could find punitive damages.

Mr. Hartman: I think it was pretty clear to me in the libel cause of action.

The Court: It is in there. But it is all right.

Mr. Hartman: It is your exception—

Mr. Murty: I just want to protect the record.

* * * * *

APPENDIX G

Defendants' Motions At Close of Plaintiffs' Case

Mr. Murty: If the Court please, at this time the Defendant would move to dismiss the first, third, fourth, fifth and sixth causes of action on the grounds that they are barred by the one-year statute of limitations.

The Court: You said, Counselor, the first—

Mr. Murty: The first, the third, the fourth, the fifth, and the sixth causes of action.

The Court: You wish to be heard, Mr. Hartman, I assume?

Mr. Hartman: You have our law, Your Honor, on it. I am trying to figure out which causes of action are which, if I may, just for a second.

The Court: As I recall, number 1 is slander; number 2 is libel; apparently number 3 is slander; 4 is intentional falsehood, based on the 11/30/71 letter; number 5 is the violation of 127 of the Insurance Law, number 6 is the contractual interference with business relations and contractual relations. Is that correct, Mr. Murty?

Mr. Murty: That's correct, Your Honor.

The only one which I have not moved on on the statutes of limitations would be the second cause of action, which is the March 10th, 1971 letter.

Mr. Hartman: Your Honor, we have submitted to you, as you are probably well aware, a series of memoranda on the subject.

The Court: Yes.

Mr. Hartman: Generally speaking, insofar as those causes of action not relating to defamation, it is clear, I think, that the tortious interference with business relationship is a three-year statute of limitations, and I think that

the motion, insofar as it relates to that must be denied. And we have a memorandum distinguishing them.

Now, the libel and slander, three-year statute. It is violation of the Insurance Law. And the sixth cause of action, which is the tortious interference with business relations, is clearly a three-year statute and therefore we are not barred. Okay?

The Court: Yes.

Mr. Hartman: Thank you, sir.

Mr. Murty: Of course, as I stated yesterday, we take the position that the allegations in the third and fourth causes of action are time barred on the basis that they are separate, distinct causes of action and do not effectively relate back so as to prevent the bar of the statute. As far as the fifth and sixth causes of action, they are basically talking damage to reputation. The Morrison case, which I cited, in which Judge Fuld talks about, there was an allegation similar to here, that he had lost employment contracts as a result of the damage to his reputation. Here there is an allegation of the loss of the Monroe County Medical as a result of what they have characterized consistently throughout as slander or defamation causes of action. And I might specifically point out the allegation of paragraph 18th of the complaint herein, Your Honor.

The Court: You talking about the amended complaint?

Mr. Murty: Amended complaint. Wherein—

The Court: Which paragraph?

Mr. Murty: Eighteen. In which as a result of said false and defamatory statements the Medical Society by letter to Dr. Webster dated March 24, 1971 addressed to Mr. Gaertner of Commercial stated quote our determination has been to retain your company but only if you recognize

the immediate transfer of our Society endorsement from Rupert & Lutz to Charles J. Sellers, Inc. By a letter of March 29, 1971, Commercial accepted this arrangement and the relationship of Plaintiff Rupert & Lutz with the Medical Society was terminated. The Plaintiffs were greatly injured to their credit and reputations and suffered great pain, injustice and economic damage as more fully set forth.

I believe that this points up the fact that the allegations of the loss of business relate directly to defamation, and I feel that paragraph six is merely an effort to stretch the statute of limitations beyond that for defamation. I had intended to move to dismiss the first cause of action on the grounds that none of the defamations had been established, but in view of Mr. Hartman's concession I do not feel constrained to move on that. There is no more necessity.

I would like to move to dismiss the fifth cause of action on the ground that no false statements have been shown regarding any policy of insurance. The Insurance Law specifically in section 27, which I believe is the only—

The Court: You mean 127, Counsel?

Mr. Murty: 127. There are other sections mentioned in there, which I would certainly move to strike on the grounds that there is nothing here as to the false advertising, there is nothing been urged upon the Court. There is nothing here as to allegation of the false statements regarding insurance corporations. And, indeed, there is no showing, of course, that Rupert & Lutz is an insurance corporation. As far as section 127 is concerned, it provides that no agent or representative of any insurer authorized to transact the business of life, health or accident insurance in the state and no insurance broker and no other person, firm or association, shall issue or circulate, or cause to be issued

or circulated, any illustration, circular, statement or memorandum misrepresenting the terms, benefits, advantages of any policy or contract of life, accident or health insurance delivered or issued for delivery, or to be delivered or issued in this—for delivery in this state, or shall make any misleading statement as to the dividends or share of surplus to be received in the future on such policy or contract.

The Court: You are reading from the first subdivision of that, Counselor?

Mr. Murty: Yes, sir.

Now, first of all, as I read the words "shall issue, or circulate or cause or permit to be circulated any illustration, circular, statement or memorandum," it seems to me that what the legislature is talking about here is a written document. The word "statement" can only be construed as a "thin" document, and thus any oral statements would be out.

Second, I just do not believe—and I have looked at all of the letters introduced. I have searched the complaint. The only reference that I can find to any statement, which concerns the policy—an insurance policy, or the terms, benefits or advantages of that policy, would be in paragraph 14th of the complaint wherein it is alleged that Mr. Sellers is supposed to have stated within the hearing of Dr. Hamilton and Dr. Webster, and perhaps others, that anyone—meaning any member of the Society—would be rated at the age 50 rates, which statement was false. And over again in the lower part of that same paragraph—

The Court: Number 14, Counselor?

Mr. Murty: That is right. And that is about the only thing I can find that talks about the terms, benefits or advantages of the policy. And there is no evidence that

such a statement was made, contained, in the trial. I do not believe that there is anything else that we have gone through in all these 10 days of trial that would indicate any liability on Mr. Sellers. Even if there is—which I don't know what there is—it is the obligation of the Plaintiff, as to this cause of action certainly, to demonstrate the falsity of any such statement. That is not my burden. I have no burden of proof with regard to this particular cause of action. The record, as I see it, is completely devoid of any proof, either of such a statement or of any proof of the falsity of such a statement. And on those grounds I move for the dismissal of the fifth cause of action.

Would Your Honor like me to continue with my motion as to the sixth and second causes of action?

The Court: Yes.

Mr. Murty: As to the sixth cause of action, I move to dismiss the sixth cause of action on the grounds that the Plaintiff has not, first of all, proven any facts which would be sufficient to demonstrate this cause of action. He has not certainly presented any evidence from which the Plaintiff, or the Court and Jury, could find that it was false. Again, I think we are limited here to events occurring prior to the 24th day of March, or even the 29th. But I believe it is the 24th of March. And there is just nothing here that is indicative of anything but perhaps strong business competition among insurance agents, and for that reason I move to dismiss this cause of action.

I also move to dismiss the second cause of action on the grounds that the letter of March 10 was not libelous as a matter of law. In this connection I would direct the Court's attention to the case of James versus Gannett, which recently came down—a recent Court of Appeals case, which

is cited at 40 NY2d 415, 386 NY Sup2d 871. That is still in the bound volumes of the pocket parts. It was decided on July 13, 1976. That was a case involving a belly dancer here in Rochester, Miss Samantha James. And the newspaper published an article in which it is alleged that the Plaintiff finds fault with two sentences. Specifically, she objects to the statement that she admits to selling her time to lonely old men with money, for as much as $400 an evening in one case, just to sit with him and be nice to him. She also alleges in a later paragraph, as Plaintiff is quoted as saying, Most men can talk to me. They can't talk to their wives because they're blocked by society. Do you understand what I am saying? They're looking for something they've lost at home. This is my business. Men is my business.

In her complaint, the plaintiff alleges that the sentences cited quote the defendant meant, and intended to mean, and was understood by the readers of said newspaper as meaning that the plaintiff was acting as a prostitute who was offering her body and her time for sale at a price, was committing the crime of prostitution, was committing adultery, was sleeping and having intercourse with various and sundry male persons for a profit, that plaintiff was a person of low and despicable moral character. She thereafter claimed damages. The Court said in a lengthy opinion, however, whether the words complained of would constitute liber per se or libel period it is for the Court to decide whether the words are susceptible of the meaning ascribed to them. Citing Tracy versus Newsday and several other cases. It also says it is the duty of the Court in an action for libel to understand the publication in the same manner that others would naturally do. The construction of it, which

behooves a Court of justice to put on a publication which is alleged to be libelous is to be derived as well from the expressions used as from the whole scope and apparent object of the writer. From the entire article, it is clear that her business consists of displaying her dancing ability and does not involve acts of illegality or promiscuity.

I also believe that the case of Tracy versus Newsday, in which a police officer employed as an investigator was reported to have been observed with a character who was involved in an investigation and the Court said that reading the article before us reasonably and taking the words in their natural import we find it is unfair to conclude that the article either states or implies anything that could subject the respondent to contempt, aversion or reduce any unsavory opinion affecting his calling as a criminologist or police officer.

I would also cite to the Court Cole Fisher Rogo versus Carl Aliy and which I will provide the Court with citations. And for that reason I would move to dismiss the second cause of action contained in the complaint.

Mr. Hartman: If it please the Court, the Sullivan against The New York Times line of cases, and the privilege there set forth, applies to newspapers, and it clearly states in each of those cases that this is not intended to take away the private libel action as between two people. So the Newsday case is a newspaper. The Samantha Jones, which we all know about here in Rochester, was publication in the newspaper. And, of course, Sullivan against The New York Times is a United States Supreme Court, which is the granddaddy of these cases. But in addition—so the privilege, that privilege relates only to newspapers and it is a First Amendment privilege and it is clearly set forth. Also, the public figure and public issue type thing.

Appendix G—Defendants' Motions
At Close of Plaintiffs' Case

In addition, in those cases, you will recognize that they are talking about the facts in those specific cases.

Now, in the Samantha Jones case, I can see that you can understand the Court said that the comments themselves, in the context of the total article are not libelous so you need go no further. In the Newsweek case similarly the association of the policeman or the text of his association with an underworld character, itself, is not libel. But the facts in this case, you have a letter in which a man is criticized in his trade or business not by a newspaper, by a competitor, and a continuing malicious pattern evolved in this. So I think each of those cases, Your Honor, is distinguishable on the facts therein, and you need look no further than the documents here to see the libel. In our case the facts are clear. Take any sentence and put it in context of the whole letter, and the intent and purpose and motive and the words themselves is very clear. So I think in that respect the motion should be denied, Your Honor.

The Court: The Court would reserve on all motions.

Are you ready to proceed?

Mr. Murty: Yes, Your Honor.

The Court: You will file your information, Counselor, that you argued this morning with the Court also.

Mr. Murty: I will, Your Honor.

Mr. Hartman: Yes. It is in our briefs now, but we will further brief these points relating to these motions that were made.

The Court: Bring in the Jury.

APPENDIX H

Defendants' Motions At Close of Defendants' Case

PROCEEDINGS

April 18, 1977
10 a.m.
In Chambers

Mr. Murty: At this time I would like to renew my motion to dismiss the third, fourth, fifth, nad sixth causes of action alleged in the complaint as to both Plaintiffs n the ground that they are barred by the one year statute of limitations. It appears that the allegations in the fifth and sixth causes of action are basically the same as the allegations of the first four causes of action. All constitute allegations of defamation, and under the rule of the Morrison case cited in my brief are time barred by the one year limitaiton of statute of limitations.

Would you like me to—

The Court: Your first cause you withdrew anyway?

Mr. Hartman: That's right.

The Court: You moved on that too, Mr. Murty? Did you?

Mr. Murty: No.

Mr. Hartman: One, it is out.

Mr. Murty: I moved on the third, fourth, fifth and sixth.

The Court: The Court would deny your motion, excepting I would grant your motion in respect to the cause of action three, and cause of action four. And I would grant your motion that you made Friday at the conclusion when the Defendant rested. As to the conspiracy motion. I will grant it in respect to the Defendant Philip D. Rupert, Jr., Richard T. Gates and Mac James Beckwith.

Mr. Hartman: For the record, may I take exception?

Appendix H—Defendants' Motions At Close of Defendants' Case

The Court: I was going to say both of you gentlemen are allowed exceptions to the ruling of the Court.

Mr. Murty: Exception.

Mr. Hartman: I take exceptions as to the ruling on the third and fourth causes of action, Your Honor.

Mr. Murty: Second, I would like to move for—

The Court: Wait a minute. Then I would also deny your motion to dismiss the counterclaim.

Mr. Hartman: On the libel, you—the libel count?

The Court: Right.

Mr. Hartman: Then I take an exception to that ruling.

The Court: All right.

Mr. Murty: In addition, I would like to move for a directed verdict and to renew my motion to dismiss the fifth cause of action on the ground that no false statements are alleged, nor is there any evidence that any statements were made by the Defendant regarding the terms, benefits or advantages of the insurance policies, nor is there any evidence of the falsity of any statement allegedly made by the Defendant regarding the terms, benefits, advantages of any policies of insurance. Under this section the Plaintiffs have the affirmative burden of proof and there is not sufficient proof to allow the cause of action to be submitted to the Jury. On the further ground there is no evidence of any sales of an insurance policy or annuity contract introduced in violation of this section for which a penalty could be sued for and recovered.

Mr. Hartman: On that one, I think—I just think there has been plenty of evidence. As a matter of fact, the insurance policies, I think it is up to the Jury to decide that the policies—there are policies that have been introduced in evidence, specimens in some cases, two actual policies.

Appendix H—Defendants' Motions At Close of Defendants' Case

And it is our contention that the Defendant misrepresented all of the policies in the sense that he actually brokered or was agent and administered a group which had precisely and exactly the same policies as the Plaintiffs, although he—I think there is evidence indicated that he was offering something different or something special, and misrepresented the manner in which the Plaintiffs were selling these policies.

The Court: Your motion is denied, Mr. Murty. You are granted an exception on the record.

Mr. Murty: I further move for a directed verdict on the fifth cause of action as to Mr. Philip D. Rupert, Jr., on the ground that it affirmatively appears that if this cause of action has any validity whatsoever it must belong to the corporation and cannot belong to Philip D. Rupert indivdiually since he had no contract which could have been violated. I also move to further dismiss this cause of action on the ground that there is no allegation and no proof whatsoever that the Plaintiff, Rupert & Lutz, is a licensed insurance agent or broker and as such no cause of action lies under Section 127.

The Court: The motion is denied. You are granted an exception.

Mr. Murty: Also, I move for a directed verdict and to dismiss the sixth cause of action on the ground that the Plaintiff has not proved by the credible evidence that the Defendant Sellers has made any statements which were relied upon by the Medical Society concerning either the Plaintiff or the programs or policies of Monroe County Medical Society which were false. That any evidence was tainted by the attempt to influence the Witness Beckwith and the Defendants' contact was justified in this instance by the economic interests which he had to protect, and by

the competitive motive and that as a result he was privileged to interfere with the relationship with which Rupert & Lutz Agency had with the Monroe County Medical Society to his own advantage. And on the further ground that the Plaintiff has not affirmatively proved that the Defendants Mr. Sellers and Sellers Company action was fraudulent, deceitful or unfair, and most particularly that any conduct by the Defendant led to the termination—that any conduct—that there is no evidence that any conduct by the Defendant led to the termniation by the Medical Society of its relationship with Rupert & Lutz.

I further move to dismiss the sixth cause of action as to the Plaintiff, Philip—well, probably—

The Court: The motion is denied and an exception is granted.

Mr. Murty: I further move for a directed verdict and to dismiss the sixth cause of action of Philip D. Rupert, Jr., on the ground that there is no evidence of any contractual or business relationship which he individually had with the Monroe County Medical Society with which the Defendants Charles J. Sellers or Charles J. Sellers and Company could have interfered.

The Court: The motion is denied. An exception is granted.

Mr. Murty: I further move for a directed verdict and renew my motion made at the close of the Plaintiffs' case to dismiss this cause of action on the ground that the letter of March 10, 1971 was not libelous as a matter of law, and for the further reasons as cited in my memorandum.

The Court: The motion is denied. An exception is granted.

Mr. Murty: I will also move to dismiss the second cause of action as against the Plaintiff, Rupert & Lutz, Incorpo-

rated—Rupert & Lutz Agency, Incorporated on the ground that there are no statements referring to the Plaintiff, Rupert & Lutz Agency except the following: Obviously the past record of Rupert & Lutz 25 years ago is not relative to today's much changed, highly competitive market. The agency personnel is also considerably changed, thus John Gaertner's letter is somewhat misleading in this area. This obviously is not actionable and without the allegation of an innuendo in the complaint cannot stand and there is no libel of the Plaintiff Rupert & Lutz Agency, Inc.

The Court: The motion is denied. An exception is granted.

Mr. Murty: Seventh, I further move for a directed verdict and to dismiss the second, fifth and sixth causes of action of the Plaintiff, Philip D. Rupert, Jr., on the ground that there is no evidence of any damage to the Plaintiff, Philip D. Rupert, Jr., alleged or shown and therefore these causes of action must fail.

The Court: The motion is denied. An exception is granted.

Mr. Hartman: Your Honor, may I move?

The Court: Yes.

Mr. Hartman: I would like to move for a directed verdict in favor of the Plaintiff with respect to libel per se, on the second cause of action, and with respect to the sixth cause—the sixth cause of action, which is the tortious interference with business. On both of those causes of action, I move for a directed verdict on the ground that the proofs are clear, the preponderance of the evidence, that no other inference could be drawn by the Jury.

The Court: The motion is denied. An exception is granted.

APPENDIX I

Defendants' Motions After Verdict

PROCEEDINGS

May 12, 1977
1:30 p.m.

Mr. Stenger: My name is John Stenger. I am a partner of Mr. Murty in Jaeckle, Fleischmann and Mugel. I have worked with him in the preparation of the motion and would like to make the oral presentation. I am asking your permission today if I may argue the post-trial motion which we have submitted.

The Court: Go ahead.

Mr. Stenger: Thank you. I have assisted Mr. Murty in preparation of the motions and therefore would like to present the oral argument. We have submitted a formal written notice of motion, Your Honor, a copy of which was served on the Plaintiffs, and I would like to submit a written memorandum in support of the motions, a copy of which has also been furnished to Counsel for the Plaintiffs. And, Your Honor, of course there are post-trial motions made pursuant to Section 4404 to set aside the verdict of the Jury, and I would assume that Your Honor would want to take some time to read our memorandum before making a final determination.

The Court: I am not going to take any time, Counselor. You had plenty of time to file it. Go ahead with your argument.

Mr. Stenger: Your Honor, we have two principal parts of our argument under Section 4404. The first part is our claim that the verdict is against the weight of the evidence and that the judgment should be set aside as a matter of

law, and therefore requiring entry of judgment in favor of the Defendants. The second part of the argument, Your Honor, is an application that the verdict be set aside in the interests of justice thereby requiring a new trial. And I would like to hit the highlights of those two parts of the argument if the Court will bear with me for a few moments today.

The Court: All right, go ahead.

Mr. Stenger: Your Honor, with regard to the first part, dealing with the weight of the evidence, of course we will have in mind that the first, third and fourth causes of action set forth in the amended complaint were dismissed by Your Honor at the close of the case, and therefore we are discussing at this point really the two causes of action upon which the Jury returned an affirmative verdict. The first being the cause of action for libel, which was designated as the second cause of action in the amended complaint. And that Your Honor will recall dealt with a letter of March 10, 1971 addressed by the Defendant Sellers to the County Medical Society. And in that cause of action Your Honor will also recall that the Jury returned a verdict of $22,000 in special damages for the individual Plaintiff, Mr. Rupert, and also general damages in the amount of $200,000 for Mr. Rupert, and punitive damages of one dollar; and with regard to the Plaintiff corporation, the insurance agency, the Jury returned a special damage verdict in the amount of $208,000 on that cause of action, and one dollar general damages and one dollar punitive damages.

Your Honor, it is our position that there was a complete failure of proof to substantiate these damage verdicts in the evidence. And I make that argument first of all with respect to the portion pertaining to the individual Plaintiff, Mr. Rupert. There simply were no special damages pleaded,

in the amended complaint, nor were any proven in the trial. There was nothing to indicate that there was a personal pecuniary loss to that Plaintiff as a result of the alleged libel. So there is just simply an absence of evidence to substantiate that part of the verdict as it pertains to the individual. With respect to the general damage portion of the verdict as it pertains to the individual, the evidence indicated, as I understand it, that the letter in question, which is the basis for the alleged libel, was actually only distributed to not more than three people. And in fact one of the three people didn't indicate that he had ever read it. And we have a situation here where the Jury was awarding damages, presumably for some damage to the person's reputation in the community. And there is no indication in the proof at all that the community was ever apprised of the alleged libelous letter. There is just nothing to substantiate any kind of harm to this person's reputation by reason of any distribution of this alleged libel among the people in the community. There was no such distribution.

Now with regard to the special damages that the Jury awarded in behalf of the corporate Plaintiff, the insurance agency. It seems clear from what did transpire in the course of the trial that the Jury must have measured the special damages in that cause of action by the alleged loss of the business from the Medical Society under the disability insurance program. As a matter of fact, of course, that is what was pleaded and claimed by the Plaintiffs. Now, the proof, as it was adduced, indicted that the letter, dated March 10th, 1971 was received by Dr. Hamilton after he had made his determination, and written his recommendation that the Plaintiff agency be terminated in the program. So therefore—and he also testified that the letter, when it was received did not influence his decision in any way. So the evidence actually shows then that the decision to terminate

the program was not in any way causally related to the receipt of the letter which is supposed to be the subject of the libel. And therefore we have a complete failure of proximate causation as between the alleged special damage under this cause of action, and the proof adduced at the trial. And for this reason it is our position that that portion of the verdict cannot stand.

Now we have also set forth other legal arguments in our memorandum, Your Honor, pertaining to the legality of it, or to the substantiality of the causes of action as a matter of law, and I don't want to burden the Court with an extensive repetition. But one of the things that certainly I think should have been considered here is the idea of the amount of intensive competition permitted. We have the reference to the Collier case, which Mr. Murty had previously given to you, which we cited in our memorandum. This is the type of conduct which is really involved. It is a matter of competing for business, which involved some comments which at the most could have been considered as harsh opinions. And opinions are protected under the free speech of the Constitution. And we have authorities for that.

Now, again, in connection with the damage feature, we have a situation in this libel cause of action, which was alleged in the second cause of action of the complaint, where there is only really one transaction, or one occasion that it is claimed that the person is libel. And under those circumstances the cause of action again cannot stand without proof of some special damage. As I indicated earlier, the proof was lacking in that regard.

Now, Your Honor still referring to our arguments as a matter of law to set aside the verdict, but turning for a moment to the other cause of action, which you will recall was denominated as the sixth cause of action, in the

amended complaint, and dealt with the alleged intentional interference with business relationship. And there I respectfully urge Your Honor that that part of the amended complaint simply fails to state a separate cause of action and should be dismissed as a matter of law. And I have in mind there this situation, which is presented in this case: The sixth cause of action as it is denominated does not contain any additional factual allegations from those previously alleged. And it merely sets forth a recapitulation of the items that had previously been alleged in the other causes of action. And the same thing is true of the fifth cause of action, if you will recall, which had to do with alleged violations of the Insurance Law. So what this amounts to is that the Plaintiffs in their sixth cause of action have simply alleged the conduct which they claim constituted libel and/or slander in the first four causes of action, three of which Your Honor dismissed and the second of which was separately submitted to the Jury. Now it is clear under the decisions of our Court of Appeals in the Noel versus Interboro case, and in the Morrison versus National Broadcasting case which are set fourth in proper citations on page 11 of our memorandum, Your Honor—that it is not permissible to call the same conduct which constitutes a cause of action for libel or slander something else in order to get it before the Jury with a new name. And that is precisely what happened here, and the effect of Your Honor's dismissal of the three causes of action which were barred by the statute of limitations was completely lost because the evidence that was presented on those causes of action went to the Jury nonetheless under the guise of this separate cause of action, which was called intentional interference with the business relation. And you can't have both. You have libel or you have intentional

interference. And you can't change the label to intentional interference by changing the name of it. So this cause of action should not have been permitted to go to the Jury and should be dismissed.

Now, furthermore with reference to that cause of action, again there is a failure of proof on the question of damages. You recall the Jury there returned a verdict for the individual Plaintiff, Mr. Rupert, in the amount of $20,000. And there is simply no evidence at all that the individual Plaintiff had any business relationship that was affected by the alleged wrongful conduct. As a matter of fact, it was not permitted on examination of the individual Plaintiff, as I understand it, to inquire into his finances to ascertain whether he had sustained any personal financial loss. And if in fact the corporation was damaged, he was a shareholder of the corporation and there is no showing that he was damaged by any damage to the corporation. And of course the Jury returned a verdict of only one dollar for the corporation. So apparently they found that they were not materially damaged.

Now turning to the second part of the argument, and at this point Your Honor I am referring to the request that Your Honor consider setting aside the verdict in the interests of justice. And I have set forth in our memorandum in support of that position various errors which we feel that were involved in the Court's charge or failing to charge on certain points which we feel had a material prejudicial effect in the final result.

Specifically on the libel cause of action, Your Honor, in admonishing the Jurors—I should say instructing the Jurors—as to what constituted libel in general terms, on page four—yes, on page four of the transcript of your charge—which is referred to on page 14 of my memorandum

which I have submitted to Your Honor—you indicated to the Jury that ". . . if a publication charges a professional person with incompetence, damages may be recovered without showing that the publication caused any specific financial loss. . . ." And I think the problem there, Your Honor, is that the publication must clearly charge the professional person with general incompetence, in order for this definition to follow, and not a single occurrence or a single instance of some mistake or incompetence as was set forth in the letter at issue. So we get to this situation where in fact with a single instance charged, and not general incompetence charged, Your Honor's instruction is erroneous for the reason a specific financial loss is necessary under those circumstances. And that's set forth in the cases that Mr. Murty previously provided to you in making a request to charge along those lines. So we had a combination of leaving the word out in what was charged and not charging the limitations that would result where a single instance of alleged libel was involved.

There was also considerable confusion, Your Honor, in the portions of your charge with regard to whether the Jury had to find that the statement was false. And I particularly have in mind when you discussed the situation if they were to find that the Defendant acted in a manner which was privileged. And this is discussed in my memorandum on page 15 and page 16. And as an illustration, in your discussion of your—of the law at this point you indicated to the Jurors at one time that quote if you find that the statement was made with ill will, or—and I emphasize the word "or" ". . . that it was false and at the time he made it Defendant knew, or believed, that it was false, your finding will be that he acted with deliberate intent to injure." And I suggest, Your Honor, that the use of the word "or" in that context would have suggested to the Jury it was not

necessary that the statement be false in order to be actionable, which of course is the proper rule of law.

And in that area again we have the problem of the failure to charge the Jury with regard to opinion, and to the idea that opinions are protected speech.

Now, turning still under the question of matters dealing with the charge, but turning now to the other cause of action, which was again that sixth cause of action, we submit that again Your Honor there were material respects in which items of the charge were not proper there, and specifically we have in mind the suggestion in the portion of your charge where the sixth cause of action could be found to be actionable against the Defendants without any wrongful conduct. In other words, the mere competition itself could be actionable. And again we get into this question of failure in this instance to charge the element of permissible competition, which I have referred to on page 17 of my memorandum, and that is the case of Terry versus Dairyman's League and the other cases cited in that decision, which Your Honor I believe received from Mr. Murty previously.

Now, one further point with regard to that sixth cause of action, Your Honor, and that was the punitive damages were charged and of course awarded on that cause of action, and at the bottom of page 17 of my memorandum is a reference to the American Electronics case, and another case there, which I think clearly shows that punitive damages are not allowed in a situation where the alleged wrong is private in character and does not have any public impact, which clearly seemed to be the situation here, or at least the Jury should have been permitted to so decide.

Now, there are certain other areas in the charge, Your Honor, which we feel, when considered together with these

others, did have a prejudicial effect, and influenced the result. And one of those which I would like to particularly direct the Court's attention to was the charge pertaining to Section 40-C of the Insurance Law. Your Honor will recall that that was a section which denominated certain type of conduct as constituting a misdemeanor, a crime. And Section 40-C of the Insurance Law by its terms applies to an insurance company or another insurer, which is clearly a definition that excludes an insurance broker, which is what the Defendant agency was. And I think it is quite clear when you study that carefully that there was no—by no manner of means could the Defendant insurance agency have been to be considered within the ambit of that section and therefore to give that section to the Jury without any kind of qualifying instructions as to whether they should consider its applicability in any other fashion, and then of course what happened is it was re-read to the Jury as I understand when they came back during the course of their deliberations, put this particular part of the charge in the context where the Jury had to consider whether the Defendant was guilty of criminal conduct. And I suggest that that was error under the circumstances, and it certainly was prejudicial to the Defendants. And particularly when you take into account the conduct of the Plaintiffs with regard to the witness Beckwith, and Your Honor's limitations on going into the potential criminality of that conduct. And further, Your Honor, in the same context is the failure or refusal to charge that Mr. Gates was an interested witness. And, of course he was a crucial witness, and Mr. Murty made that request, which I understand was not granted, that he be denominated as an interested witness and therefore the Jury was deprived of the right to scrutinize his testimony in proper manner.

And then I submit, Your Honor, that when you take these matters together they have a cumulative effect. You may look at one or the other and feel that well, maybe that wasn't so serious. But when you take them together you have to consider the overall impact of this cumulative effect, which I suggest in itself was sufficient reason to set aside the verdict.

Now there is a further point under the request to set aside in the interest of justice that I ask Your Honor to consider and that is a similar point. It has to do with some of the evidentiary rulings, and this is on page 21 of our memorandum. And specifically I would like to direct Your Honor's attention to the admission in—I'm sorry—I said page 21 and that was an error, Your Honor. I should have said page 22. It begins on page 22. In that connection, Your Honor, I would specifically like to direct your attention to the receipt into evidence of a part of a letter which the Defendant Sellers had written under date of November 10, 1973 to a Mr. James S. Smith of the Continental Insurance Company. And in that letter was a reference to a piece of business having a possible premium potential exceeding a half a billion dollars. And it seems in retrospect that the only reason for the offer of that portion of the letter was to get that astronomical figure before the Jury for their consideration because otherwise there was no mention at all of this document in Plaintiff's counsel's summation except that. And there is no other purpose that it would seem to have served; it was completely irrelevant to the issues. And of course that had the effect of suggesting that the Defendant, dealing in such large premium dollars, must have been a very wealthy man. And we suggest that that had a very prejudicial effect and that it was improper was already established by an earlier

Appellate Division decision in this very case in which Justice Witmer pointed out the Defendant's wealth should not be a weapon to be used against him in the case.

Now I have some further points Your Honor on the evidence, and I don't want to burden you with considerable detail on these. But I do want to suggest that the testimony of the so-called expert witness Morrison was just too remote and too speculative, and not credible to be submitted to the Jury; it obviously had an effect on their decision in reaching the amount of the verdict that they did. And how he could postulate a 50 percent decrease in value of the agency with a loss of income of 12 percent, when the other items that were available, in the tax returns and auditor's reports, actually showed an increase in value just defies imagination but that is what is in the record apparently and apparently was given to the Jury for their consideration. And again that is the type of thing that we just can't really measure the full import, impact, upon the result that was reached by the Jury except when you consider the amount of the verdict itself. And as my final point on this argument, in connection with the interests of justice, I do wish to urge upon the Court that the verdicts themselves are grossly excessive, and that a new trial is justified for that reason alone. And again, I won't go into details of the amounts of the verdicts on each cause of action because I have referred to those in my earlier remarks. But it seems clear under the circumstances, for example, when you are talking $208,000 of alleged special damage, and $200,000 of alleged general damage, to an individual whose reputation in the community was not shown to be affected in any way, that there had to be some other factors working in the Juror's mind to reach those kinds of results. And it seems in retrospect that the only thing that could have caused such an inflated verdict must

have been a sympathy factor in the minds of the Jurors. And it is unfortunate that Mr. Rupert as I understand it has speech difficulty but I think it seems that the result of that and the manner in which Mr. Hartman as I understand it in summation made references to Mr. Rupert as having been mocked, or some such language as that, could only have inflamed the sympathy aspect.

The Court: I don't recall that, Counsel, at all. I don't recall that at all.

Mr. Stenger: I understand the word "mocking" was used, Your Honor, with reference to—

The Court: Go ahead with your argument.

Mr. Stenger: (Continuing)—with reference to Mr. Rupert. And this type of argumentation playing on the sympathies of the Jury, which would be natural under those circumstances, I think clearly had the impact of inflating the verdict out of all proportion to anything that was proven.

Your Honor, one final point, and this is on the separate cause of action, separate action actually, which was brought in favor of the Sellers, and against the Plaintiffs in this action as Defendants in that one, plus others, we are requesting that Your Honor set aside the verdict of no cause of action there, and in that affirmative suit also in the interests of justice, and order a new trial on the grounds that the cumulative effect of the things that I have been talking about here had "not" necessarily to spill over; the same Jury had to consider all of these items together. And the things that went into their determination, which I have suggested heretofore in my argument, are improper and necessarily had to work the same type of impropriety overall on the verdict and for that reason we ask that also be set aside, Your Honor.

So in conclusion I respectfully ask Your Honor to issue an order setting aside the verdicts, and either entering judgment in favor of the Defendants or ordering a new trial.

Thank you, Your Honor.

EXHIBIT J

Excerpts From Defendants' Requests to Charge

INSTRUCTION AS TO DEFAMATION

This is an action to recover damages for libel. A libel is a publication or writing which tends to disgrace or discredit a person in the community. If a publication charges a professional person with general incompetence, lack of character or total disregard of professional ethics damages may be recovered without showing the publication caused financial loss to the plaintiff. If, however, the publication only charges specific instances or ignorance, mistake or impropriety on the part of the plaintiff, he may not recover unless he proves that the article was a substantial factor in causing him financial loss.

Here the plaintiff alleges that the publication misrepresents the facts relating to and underlying plaintiff's insurance programs, proposals and advise and by implication, falsely impugns the plaintiff's professional competency, integrity and loyalty to the Medical Society.

In the defendant's letter of March 10, 1971, it is the defendant's claim that the facts set forth therein are true and that the opinions expressed therein by the defendant are reasonably based upon the facts stated therein or upon facts which were known to or assumed by Mr. Irish, Dr. Webster and Dr. Hamilton.

An opinion is not defamatory when the maker of the comment states the facts upon which he bases his opinion of the plaintiff, or when both parties to the communication know the facts or assume their existence and the comment is clearly based on those assumed facts. The effect of the rule that there can be no recovery in defamation for a

pure expression of opinion can be set forth by applying it to four fact patterns: (1) If the defendant bases his expression of a derogatory opinion of the plaintiff on his own statement of false and defamatory facts, he is subject to liability for the factual statement but not for the expression of opinion. (2) If the defendant bases his expression of a derogatory opinion of the plaintiff on his own statement of facts which are not defamatory, he is not subject to liability for the factual statement—nor for the expression of opinion, so long as it does not reasonably indicate an assertion of the existence of other, defamatory, facts which would justify the forming of the opinion. The same result is reached if the statement of facts is defamatory but the facts are true (see Section 582[*]), if the defendant is not shown to be guilty of the requisite fault regarding the truth or defamatory character of the statement of facts (See Sections 580A and 580B), or if the statement of facts is found to be privileged. (See, sections 593-612). (3) If the defendant bases his expression of a derogatory opinion on the existence of "facts" which he does not state but which are assumed to be true by both parties to the communication, and if the communication does not give rise to the reasonable inference that it is also based on other facts which are defamatory, he is not subject to liability, whether the assumed facts are defamatory or not. (4) If the defendant expresses a derogatory opinion without disclosing the facts on which it is based, he is subject to liability if the comment creates the reasonable inference that the opinion is justified by the existence of unexpressed defamatory facts. It makes no difference whether this is explained by holding that there was thus a publication of false, defamatory facts (thus making Section 565 applicable) or that an expression of a mixed opinion can itself be a defamatory communication.

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* RESTATEMENT (SECOND) TORTS

Exhibit J—Excerpts From Defendants' Requests to Charge

PROPOSED INSTRUCTION OF SIXTH CAUSE OF ACTION

This cause of action is brought upon the theory that these defendants maliciously and without legal or social justification, caused the Monroe County Medical Society to transfer its endorsement of its insurance program from the plaintiff, Rupert & Lutz Agency, Inc. to the defendant, Charles J. Sellers & Co., Inc. If the defendants deprived the plaintiff of the endorsement by means not in themselves unlawful, by acts not in themselves unlawful, or which have any proper purpose to serve, they are not liable for the damage they caused. The genesis which will make a lawful act unlawful must be a malicious one, unmixed with any other and exclusively directed to injury and damage to another. In other words, it is incumbent upon the plaintiff to establish to your satisfaction that the action of the defendant was without legal or social justification; that their action was motivated by an improper desire (Terry vs. Dairymen's League Cooperative Association, 2 A.D.2d 494, 157 N.Y.S.2d 71, 76).

Intent to take over another's business would not constitute the malicious and unjustifiable intent which is required. Intent to bypass, circumvent, or to destroy plaintiff's endorsement there may have been, but if carried out by lawful means, motivated chiefly by a desire to make profits, there is no actionable wrong even though there is a callous disregard of the incidental injury to plaintiff which would necessarily follow. Defendant's self-interest negatives malice, even though the means employed might be of questionable morality and ethical validity. Competition as such, no matter how vigorous or even ruthless,

is not sufficient. (Benton vs. Kennedy VanSaun Manufacturing and Engineering Corporation, 2 A.D. 2d 27, 152 N.Y.S.2d 955 (1956)).

Expressions of opinion regarding plaintiff's future conduct or ability are not fraudulent or the type of conduct which will justify a finding against the defendant (Union Car Advertising Co., Inc. vs. Collier, 263 N.Y. 386, 189 N.E. 463 (1934)). Likewise, expressions of opinion as to the present are not defamatory or actionable where the defendant states the facts upon which he bases his opinion of the plaintiff or when both parties to the communication know the facts or assume their existence and the comment is clearly based on the assumed or disclosed facts. (Restatement of the Law, Second, § 566 (Tentative Draft 21, April 5, 1975)).

It is necessary for the plaintiff to show that statements were made by the defendant, that they were in fact false, and that the defendant either knew they were false or that they were so reckless and careless as the defendant must have known they were false.

To enable the plaintiff to recover on a cause of action like this, it must prove that the endorsement would not have been transferred to the defendant, Charles J. Sellers & Co., Inc. but for the wrongful and alleged interference of the defendants. If you find that the defendants were competitors and that they interfered successfully to themselves, the plaintiff cannot recover unless plaintiff can show fraud or deceit on the part of the defendant. (Union Car Advertising Inc. vs. Collier, supra.).

Fraud and deceit occur when one represents as true that which is false with intent to deceive the person to whom the representation is made and that person, believing

the representation to be true, acts in justifiable reliance on it. Here the plaintiff claims that the defendant made false representation to the Medical Econcmics Committee of the Monroe County Medical Society which were false and that the Medical Economics Committee justifiably believing those false accusations to be true, acted to replace Rupert & Lutz Agency as their administrator of their disability insurance plan with the defendant, Charles J. Sellers & Co., Inc. Defendant denies that he made any such false statement, contends that the statements of fact which he made are true, and that any other statements with regard to the plaintiff therein were merely matters of opinion. The burden of proof is on the plaintiff to establish, first, that defendant made a representation of fact to the Medical Society. Second, that such representation was not true; third, that the defendant intended to deceive the Medical Society; fourth, that the Medical Society believed and justifiably relied upon the statement and was induced by it to replace the plaintiff as administrator; and fifth, that as a result of the reliance of the Medical Society upon the statement, the plaintiff suffered his pecuniary loss.

The first question for you to determine, therefore, is what defendant said to the plaintiff. If it was a statement of opinion rather than a statement of facts, defendant cannot be held responsible, for opinions are matters of judgment for which, under the circumstances of this case, the law does not impose liability. If you find that the defendant's statements amounted to no more than an expression of his opinion, your verdict will be for the defendant. If you find that the defendant's statement was a statement of fact, your finding will be that he made a representation of fact.

Exhibit J—Excerpts From Defendants' Requests to Charge

If you find that the defendant made a representation of fact, you will next consider whether that representation was true or false. If you find it was true, your verdict will be for the defendant. If you find it was false, you will then determine whether defendant made the representation with intent to deceive the Medical Economics Committee. A false statement is made with intent to deceive if it is made with knowledge that it is false. Again, this does not mean, however, that every word and every sentence need be proved true. Variance and immaterial particulars may be disregarded. Exaggerated puffing or boasting appear to be the very breath of salesmanship. The test is whether the statement as published or made would have had a different effect on the reader or hearer than the truth would have produced. Moreover, even though you do not find that the defendant knew his statement to be false, you may, if under all the circumstances you deem such a finding proper, infer that defendant intended to deceive, provided you find that the statement was false and that the defendant made it recklessly with the pretense of knowledge that it was true when in fact he knew that he had no such knowledge. I emphasize, however, that in such a case it is not enough that the statement was negligently made. Negligence, if you find it sufficiently gross, is evidence from which you may infer that the statement was recklessly made but you cannot find that there was intent to deceive unless you find that the statement was made recklessly. If you find that the defendant did not know the representation to be false, or make the representation recklessly without knowledge whether it was true or false, your verdict will be for the defendant. If you find the defendant knew the representation to be false or made the representation recklessly without knowledge whether it was true or

Exhibit J—Excerpts From Defendants' Requests to Charge

false, your finding will be that there was intent to deceive and you will then determine whether the plaintiff believed the representation and acted in justifiable reliance upon it. Whether a person to whom a representation is made is justified in relying on it generally depends on whether the fact represented is one that a reasonable man would consider important in reaching the decision in a transaction of business. But even though it is not such a fact, reliance may be justified if the person making the representation knows that the person to whom it is made considers it important and will rely on it. If you find that a reasonable man would have considered the representation important in deciding whether to act and that the defendant did not know that the plaintiff considered the fact was important and would rely on it, or if you find that the Medical Economics Committee did not believe the representation or that even though he did, it was not a substantial factor in his decision to replace the plaintiff, your verdict will be for the defendant. If you find that a reasonable man would have considered the statement important in deciding whether to act or that the defendant knew the plaintiff considered the fact important and would rely on it and you find that the Medical Economics Committee believes the statement and its belief of that statement was a substantial factor in his decision to replace the plaintiff, your finding on the issue of reliance would be for the plaintiff and you would then determine whether plaintiff was damaged.

Supreme Court, U. S.
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No. 80-229

In The

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES J. SELLERS, JR. and
CHARLES J. SELLERS AND CO., INC.,

Petitioners,

against

PHILIP D. RUPERT, JR. and
RUPERT & LUTZ AGENCY, INC.,

Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Preliminary Statement

Petitioners seek a hearing before this Court by characterizing this case as one which raises a basic issue of constitutional law — whether the constitutional limitations on the law of libel set forth in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) apply in a libel suit brought against defendants who are not members of the media.

In support of their contentions petitioners not only mischaracterize the facts and procedural history of this case, but also omit references to the record and opinions below which, if cited, would reveal that this case is not one that should be considered by this Court. On the contrary, the constitutional issues advanced by petitioners were properly not a part of the outcome they now seek to overturn.

Petitioners claim that the *Gertz* issue arises in several contexts. They first assert that the trial court instructed the jury that it could return verdicts for the plaintiffs without finding any degree of fault on the part of defendants with respect to their libels. Not only does the charge support the conclusion that the jury was required to find fault but the courts below also found that petitioners failed to object to the court's instruction on this issue and in fact requested a charge which was substantially the same as the one rendered. Thus the constitutional objections were knowingly and specifically waived. Additionally, the Appellate Division specifically found that there was evidence in the record sufficient to meet "any predictable burden of proof, be it negligence, actual malice or some intermediate degree of fault." (PA 5).[1] And the jury made four separate unanimous findings of malice in connection with its punitive damage awards.

Petitioners also claim that the New York appellate courts permitted the award of presumed or general libel damages to the individual plaintiff despite the fact that the intermediate appellate court found that that plaintiff suffered no "actual personal damages". What they fail to point out, however, is that this statement was made in support of the court's decision to reverse a $22,000 *special damage* verdict to the individual plaintiff and did not relate to the $200,000 compensatory

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[1]References to the appendix to the petition for certiorari are designated "PA_____." Similary, references to the body of the petition for certiorari are designated "P_____," and references to the appendix to this brief are designated "RA_____."

damage award, which was supported by ample evidence of injury, as the courts below specifically found (PA 20-21).

In addition, petitioners erroneously state that the courts below specifically found that the damages sustained by the corporation were not caused by the alleged libel or, in the alternative, that the record supports only that conclusion, and that the courts below were therefore wrong in affirming on the question of causation. However, no court has found the lack of requisite causation between the damages complained of and the libelous letter. The jury was specifically charged that it must find that the letter caused the damages (PA 40-41, 47); and the record is replete with support for this position. Petitioners create only an issue of fact which seven jurors and eleven judges have resolved against them.

Finally, petitioners argue that their First and Fourteenth amendment rights were violated because liability was imposed on the basis of constitutionally protected statements of opinion. Contrary to these assertions, the courts below, in reviewing the libelous material, found specifically that the letter in question was not constitutionally protected opinion. Nor were petitioners' comments based upon facts verified, independently or otherwise, by the audience to whom they were addressed.

Because of petitioners' mischaracterizations, respondents submit the following counterstatement of facts.

Counterstatement of Facts

Petitioners characterize this case as one involving the Monroe County Medical Society's consideration of insurance proposals advanced by respondents rather than a lawsuit about defamation and tortious business interference. Despite detailed affirmed findings of fact by the Appellate Division (PA 5-11) petitioners continue to mischaracterize the facts and make conclusory allegations without citation to the record.

This case is one in which the libels of the petitioners injured the reputation of the individual plaintiff and caused substantial business loss to his company. The Monroe County Medical Society had been respondent Rupert and Lutz' best account for over twenty-five years. At the time the events of this lawsuit took place it appeared that Rupert & Lutz would have the account another twenty-five years; but, only four months later they were fired — summarily, without warning, and without explanation. They were fired as a result of a covert campaign by petitioners, misrepresenting respondents to the Medical Society and intentionally and purposefully defaming both plaintiffs.

In December, 1970, respondents gave the Medical Society advice concerning new options with respect to its insurance policies. The Executive Director of the Society, subsequent to the presentation by Rupert & Lutz, wrote petitioner Sellers and asked if he had any "ideas who might be consulted" to evaluate the insurance alternatives raised by the Rupert & Lutz proposal. He wanted somebody with no "ax to grind" or "personal stake" in the matter. Mr. Sellers was not asked to comment upon Rupert & Lutz' handling of the account. From December 1970 through January 1971, however, Sellers wrote a barrage of letters advancing himself and criticizing respondents not only on the issues raised by the Medical Society but on other subjects as well. He predicted disaster if the Medical Society followed the respondents' advice. Included in the Appendix to this brief is correspondence admitted into evidence without objection illustrating the language and tone employed by Mr. Sellers (RA 5-29).

The March 10, 1971 defamatory letter was the culmination of the Sellers campaign to discredit Rupert & Lutz and take away the Medical Society business. In it, among other things, he accused respondent Rupert of failure, of making misstatements, of a parade of blunders, of lacking business ability and of threats and bluffs. (PA 35-38). None of the alleged opinions in that letter

were based on anything other than false information which Sellers had been spoon-feeding the Medical Society for months.

Incredibly, petitioners claim (P 3) that there was no evidence whatsoever that the letter had any bearing on the decision to replace Rupert & Lutz. Not only was this question squarely presented to the jury by the charge of the court, (PA 40-41, 47) but the record abounds with evidence to support independently the requisite finding of causation.[2] Petitioners now would ask this Court to act as an additional reviewer of the facts when the jury and both New York appellate courts have already concluded that the causal link exists between the March 10 letter and respondents' injuries.

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[2]Dr. Hamilton, contrary to petitioners' assertion, did not terminate Rupert & Lutz. The Board of Directors did. Hamilton may have decided to recommend a change in administrators, but he, Dr. Webster, and Sellers all testified that it was up to the Board of Directors to make that decision. The decision to discharge Rupert & Lutz and Hamilton's recommendation were both made at a meeting the Board held on March 23, two weeks after the Sellers letter in which he specifically requested that the account be transferred to him. Finally, Hamilton admitted that he could not be certain whether or not he had seen Sellers' letter of March 10 prior to preparing his report to the Board of Directors. There was no evidence to the contrary.

REASONS FOR DENYING THE WRIT

POINT I

The application of *Gertz* to non-media defendants is not squarely presented by the decision below, since that decision rests upon alternative grounds, including a finding that respondents satisfied the *Gertz* standards in any event.

Among the many issues raised by petitioners before both New York appellate courts (but never raised in the pleadings, at trial, or in any proceeding prior to appellate review) was that the unanimous jury verdict against them violated the standards set forth in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), regarding the fault standard applicable in defamation cases and the necessity of proving "actual damages" absent a finding of "actual malice." Relying upon the New York Court of Appeals' statement in its memorandum decision that "[d]efendant's remaining contentions have been examined and found to lack substantial merit" (PA 1-2), petitioners contend that "the Court of Appeals thus passed on the merits of petitioners' constitutional contentions" (P 8)[3] and that this case therefore presents "a uniquely attractive opportunity" (P 18) to determine whether *Gertz* applies to purely private defamation actions.

This argument, however, distorts the decisions of the courts below. Although a majority of the Appellate Division, Fourth Department expressed the view that it would be inappropriate to apply *Gertz* to this case (PA 4-5), the court did not affirmatively rule on the constitutional issue, but instead rested its decision upon alternative grounds indicating that the jury verdicts were

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[3]The Court of Appeals had previously granted respondents' motion to dismiss petitioners' appeal as of right, on the ground that "no substantial constitutional issue is directly involved." 46 N.Y.2d 1074 (1979) (RA 4).

proper even within the constitutional framework of *Gertz*.[4] Since the memorandum affirmance by the New York Court of Appeals also cannot be read as having decided this constitutional issue, the applicability of *Gertz* to private defamation cases is not implicated by the decision below and a writ of certiorari is totally unwarranted.

The first of these alternative grounds, and one addressed specifically by both the Appellate Division and the Court of Appeals, is that petitioners waived any objection to the trial court's charge on liability by failing to raise that issue at the time of trial. (PA 1, 4). Petitioners have attempted to invoke this Court's jurisdiction by misleadingly suggesting that a substantial constitutional issue has been raised as to whether they could or did waive their constitutional rights.

The finding of waiver by both the Appellate Division and the New York Court of Appeals is so firmly supported by both the facts and by principles of constitutional law that the propriety of that holding is beyond dispute. First, it is clear that constitutional objections, even those based on First Amendment rights, may be waived by failing to raise them at a proper time. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143 (1967). Petitioners have argued, however, that any such waiver must be "knowing and intelligent", citing *Curtis Publishing Co.* Not only does that case not adopt such a standard, but this Court has also stated: "Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defen-

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[4]The Appellate Division majority merely concluded that it was not the function of an intermediate appellate court to decide constitutional issues " 'unless their consideration is necessary to the disposition of the individual case.' " (*quoting Moran v. Hearst Corp.*, 40 N.Y.2d 1071, 1072 (1976)) (PA 5). The majority then added that "there is evidence in the record sufficient to meet any predictable burden of proof, be it negligence, actual malice or some intermediate degree of fault." *Id.*

dant in order to preserve a fair trial." *Schneckloth v. Bustamonte*, 412 U.S. 218, 237 (1973).

The record in this case overwhelmingly demonstrates that petitioners did indeed knowingly and intelligently waive their constitutional objections. *Gertz* was decided almost *two years* before the trial of this action, yet defendants made no reference to that case or to the constitutional theory it embodies at any time during the trial. Further, as the New York Court of Appeals indicated, "defendant not only failed to object to the court's instruction, but in fact requested a charge which was substantially the same as the one rendered." (PA 1).[5] It is difficult to

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[5]Defendants requested that the court charge the jury in pertinent part as follows: "This is an action to recover damages for libel. A libel is a publication or writing which tends to disgrace or discredit a person in the community. If a publication charges a professional person with general incompetence, lack of character or total disregard of professional ethics damages may be recovered without showing the publication caused financial loss to the plaintiff. If, however, the publication only charges specific instances of ignorance, mistake or impropriety on the part of the plaintiff, he may not recover unless he proves that the article was a substantial factor in causing him financial loss. . . . In the defendant's letter of March 10, 1971, it is the defendant's claim that the facts set forth therein are true. . . ." (PA 103).

On the issue of liability, the trial court charged the jury in pertinent part: "Libel is a publication in writing which tends to disgrace or discredit a person in the community. . . . Now, if a publication charges a professional person with incompetence, damages may be recovered without showing that the publication caused any specific financial loss to the plaintiff. If you find that the letter of the defendants as understood by those who received it, and read it, did disgrace the plaintiffs' reputation, or discredit them in the community, your verdict will be for the plaintiffs. If you find that the letter did not disgrace plaintiffs, or discredit them in the community, then your verdict will be for the defendants.

"Defendant contends that the written statement it is charged with making is in fact true. . . . If you find that the statement differed in substantial respect from the truth, your finding will be for the plaintiff on this issue." (PA 40-42).

imagine a more "knowing and intelligent" decision not to assert a questionable constitutional defense, and petitioners should not now be permitted to use that decision as an avenue of access to this Court.

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), upon which petitioners rely, stands in sharp contrast to the record presented here. Unlike the present case, where the principles of *Gertz* were well established at the time of trial, the claim of waiver rejected in *Curtis Publishing Co.* was based upon the defendant's failure to raise the constitutional standard of "actual malice" as a defense to a libel action *before* that standard was clearly enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Since petitioners here can claim no similar uncertainty in the law, the finding of waiver of their constitutional objections by the courts below offends no constitutional provision and presents no substantial issue for review by this Court.

An even more compelling reason for denying a writ of certiorari in this case is that the *Gertz* standards with regard to fault have been fully satisfied. Speaking for the entire Appellate Division on this point, the concurring justice concluded that the numerous punitive damage awards[6] were predicated upon a finding of "actual malice," i.e., reckless disregard for the truth. (PA 16). Even *Gertz* does not require so stringent a showing in defamation actions involving private plaintiffs (418 U.S. at 347), and the punitive damage awards therefore satisfy any conceivable constitutionally mandated fault standard.

Petitioners contend, however, that the findings of malice implicit in the punitive damage awards cannot support a consti-

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[6]The trial court charged on the issue of malice not only in connection with punitive damages under the libel count (PA 44-46), but also regarding the defense of qualified privilege (PA 43-44) and punitive damages on the tortious interference count (PA 48-50).

tutional determination of fault because the trial court's charge contained isolated references to "personal spite" or "ill will." As the Appellate Division stated, however, (and as the New York Court of Appeals necessarily concluded as well), the charge, *read as a whole,* instructed the jury that punitive damages could only be predicated upon a finding that defendants acted in reckless disregard for the truth. (PA 16).

In this regard, the decision below finds ample support in *Curtis Publishing Co. v. Butts, supra.* In that case, the trial court's charge on punitive damages defined malice to include not only "wanton or reckless indifference or culpable negligence" but also "ill will, spite, hatred and intent to injure one." 388 U.S. at 165-66 (concurring opinion of Warren, C.J.). This Court, however, concluded that the punitive damage award was sufficient to satisfy the *New York Times* test for "actual malice," stating:

> The impact of a jury instruction "is not to be ascertained by merely considering isolated statements but by taking into view all the instructions given and the tendencies of the proof in the case to which they could possibly be applied." • • •
>
> • • •
>
> Given the extended history of the case, the amount of the evidence pointing to serious deficiencies in investigatory procedure, and the severe harm inflicted on Butts, we would not feel justified in ordering a retrial of the compensatory damage issue, either on the theory that this aspect of the case was submitted to the jury only under the issue of "truth," or on the very slim possibility that the jury finding regarding punitive damages might have been based on Curtis' attitude toward Butts rather than on Curtis' conduct.

388 U.S. at 156-57 (citation and footnote omitted).

It is equally obvious here that the trial court's charge on punitive damages permitted a finding of malice only if the jury concluded that the defendant acted with knowledge of falsity or

reckless disregard for the truth. That was the only theory actually submitted to the jury, or that plaintiffs ever relied upon, and the greater part of the court's various charges on the issue of malice was devoted to a careful explanation of the meaning of "reckless disregard."[7]

Not content to rest upon this ground alone, the Appellate Division majority also reviewed the record and made its own independent finding of fault to satisfy the *Gertz* standard, stating: "[T]here is evidence in the record sufficient to meet any predictable burden of proof, be it negligence, actual malice or some intermediate degree of fault." (PA 5). As this Court has stated, the finding of fault necessary to satisfy constitutional limitations in defamation cases need not be made by the jury, but may be made in the first instance by an appellate court. *Time, Inc. v. Firestone*, 424 U.S. 448, 461-62 (1976). Since that finding is undeniably supported by the record,[8] as the New York

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[7]The charges states, in part: *"In proof of malice plaintiff claims that the defendant published its statement without any reason to believe in their truth,* and refused plaintiff's request that it cease making such statement.... If you find that defendant's source was not trustworthy, or that defendant did not rely upon the claimed source, or acted recklessly in relying upon a claimed source, or the information received by defendant did not intend to establish the truth of the charges defendant made, or that defendants' statements did not fairly, accurately and completely state the information received, you may, if on consideration of all of the evidence, you deem it proper to do so, find that the defendant acted with malice...." (PA 45) (emphasis added).

[8]As the concurring justice in the Appellate Division stated for the entire court: "The totality of the onslaught was such that the jury could have found malice from the sheer number of misrepresentations. Defendant Sellers' extensive writings and conversations with the Medical Society and the Continental plainly attacks the plaintiffs' professional and personal competence, their honesty, leadership of their own agency, the financial stability of the agency, and its relationship with other groups and the advice, counseling and service they had rendered to the Medical Society for a period of over 25 years. The letter of March 10, 1971 clearly libels plaintiffs in these

Footnote continued on next page—

Court of Appeals obviously concluded, the decision below does not conflict with any decisions of this Court and presents no substantial constitutional issue for resolution.

Even more misleading is petitioners' attempt to raise a constitutional issue concerning the "presumed damages" aspect of *Gertz*, by arguing that the Appellate Division found no evidence of any "actual personal damages" to Rupert. Indeed, petitioners out-of-context quotation of that phrase from the Appellate Division opinion is a shocking distortion and misrepresentation of the facts and of the decisions of the courts below. Even a most cursory reading of the Appellate Division decision reveals that the court used the phrase "actual personal damages" solely in connection with its decision to reverse the *special damage* award to Rupert personally. (PA 21). It therefore embodies only the conclusion that Rupert suffered no out-of-pocket financial loss as a result of petitioners' libelous statements, and not that he suffered no personal injury of any kind. As this Court stated in *Gertz:*

> We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish

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—Footnote continued from preceding page

respects. Undeniably persuasive to the jury was the fact that all these machinations were accomplished while Sellers held himself out as an independent consultant motivated by concern for plaintiffs when, in reality, as revealed at the trial, he was acting covertly out of a desire to further his own business interests, keeping plaintiffs in the dark until it was too late to defend themselves." (PA 16).

A number of Sellers' previous letters, which were properly before the jury without objection on the issue of malice, are contained in the Appendix to this brief. (RA 5-29).

> and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

418 U.S. at 349-50.[9]

The trial court's charge on damages accorded with these principles,[10] and with New York law, which also requires evidence of actual injury as a basis for defamation damage awards.[11] Both the Appellate Division (PA 20) and the Court of Appeals (A 1) found ample and convincing evidence in the record to support the jury's assessment of damages, a determination

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[9] *Gertz* also states that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U.S. at 349. Since both the jury and the Appellate Division have made the requisite finding of "actual malice," the *Gertz* limitation on presumed damages is inapplicable in any event to this case.

[10] The charge states, in pertinent part: "If you find that plaintiffs are entitled to recovery you will award them such amount as in the exercise of your good judgment and common sense you find is fair and just compensation for the injury to plaintiffs' reputation and business, and the humilation and mental anguish in their public and private lives, which you find was directly and actually caused by the defendants' actions. In fixing that amount you should consider plaintiffs' standing in the community, the nature of defendants' charges against them, the extent to which the statement was circulated, the tendency of the statement to injure such a person as plaintiff, and all of the other facts and circumstances surrounding the parties. Such damages cannot be fixed with mathematical accuracy. Fair compensation may vary from nominal damages of one dollar, if you find the injury to have been negligible, to a substantial sum, if you find the injury to have been substantial." (PA 46).

[11] *Crane v. New York World Telegram Corp.*, 308 N.Y. 470, 476 (1955); *Paris v. New York Times Co.*, 170 Misc. 215 (Sup. Ct. N.Y. Co. 1939), *aff'd mem.*, 259 A.D. 1007 (1st Dep't), *rearg. denied*, 268 A.D. 859 (1st Dep't 1940).

that is reviewable in this Court only in extraordinary situations.[12]

The New York Court of Appeals correctly concluded that "no substantial constitutional issue is directly involved." (RA 4). Both the Appellate Division and the Court of Appeals found that petitioners waived their right to assert such objections and that, even if *Gertz* applied to this case, its standards were fully satisfied. Since the record in this case so overwhelmingly demonstrates the correctness of these holdings, no constitutional issues are legitimately implicated by the decision of the court below and the writ of certiorari should not be granted.

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[12]The sufficiency of the evidence in support of the damage verdict is plainly a question of fact within the province of the state courts. Although this Court is not precluded from reviewing such factual issues where important constitutional questions are involved (*see Letter Carriers v. Austin*, 418 U.S. 264, 282 (1974)), "[e]ven where a question of fact may have constitutional significance, we normally accord findings of state courts deference in reviewing constitutional claims here." *Time, Inc. v. Firestone*, 424 U.S. 448, 463 (1976).

Pettioners also contend that the special damage award to Rupert & Lutz raises the same "presumed damage" issue because, in their view, the record does not show that the March 10, 1971 letter caused the loss of the Medical Society account. This causation issue is also in question of fact and has been resolved against petitioners by a jury and by two appellate courts, and offers no basis for constitutional review in this Court.

POINT II

The decision below correctly determined that the defamatory letter did not contain any constitutionally protected statements of opinion and therefore presents no conflict with the decisions of this Court.

In attempting to persuade this Court to grant certiorari on the opinion issue, petitioners place heavy emphasis on the statement in *Gertz* that:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correctness not on the conscience of judges and juries but on the competition of other ideas.

418 U.S. at 339-40. However important this principle might be, petitioners have purposefully ignored the fact that it serves only as a preamble to the constitutional principle for which *Gertz* truly stands:

> But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co. v. Sullivan*, 376 U.S., at 270. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

418 U.S. at 340. On the record before them, the New York courts had no choice but to conclude that the March 10 letter did not contain constitutionally protected opinions, a determination that is fully in accord with the decisions of this Court.

Petitioners contend that the trial court committed an error of constitutional proportions by failing to charge the jury that opinions are not actionable. Yet as petitioners conceded in the

court below, whether a particular statement constitutes fact or opinion is a question of law to be decided by the trial court in the first instance. *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 381, *cert. denied*, 434 U.S. 969 (1977). *See also Letter Carriers v. Austin*, 418 U.S. 264, 283-84 (1974). In refusing to charge the jury on the opinion issue, the trial court simply exercised its proper function and necessarily concluded that the March 10 letter contained no constitutionally protected opinions.

Petitioners rely exclusively upon the characterization of the March 10 letter by Justice Cardamone in the Appellate Division as a "mixture of opinion and fact," (PA 17) and that the letter "was not constitutionally protected as a statement of opinion only." *Id.* From this, petitioners argue that both the Appellate Division and the Court of Appeals regarded some statements in the March 10 letter as constitutionally protected opinions. Petitioners, however, have once again misleadingly omitted the crucial portion of the Appellate Division's determination on this issue: "Since the letter of March 10, 1971 itself and defendant's testimony are all to the effect that Sellers had opinions backed up by hard facts and concrete evidence, the letter was not constitutionally protected as a statement of defendant Sellers' opinion." (PA 17). In affirming, the New York Court of Appeals necessarily agreed that no constitutionally protected opinions were involved.

To the extent that the Appellate Division found "opinions" in the March 10 letter, it also recognized that these opinions purported to have a factual basis. (PA 17). This case therefore falls within the rule established by the New York Court of Appeals in *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 639, *cert. denied*, 434 U.S. 969 (1977), that statements of opinion are entitled to constitutional protection only where "the facts supporting the opinions are set forth." *Id.* at 380.[13] Since the

[13]This rule finds its source in the Restatement (Second) Torts §566 (1977). Although this Court has had no occasion to consider the Restatement rule, its validity is not an issue before this Court since petitioners have relied upon it both in their requests to charge at trial (PA 103) and on appeal.

March 10 letter was not based upon facts known to the recipients, the decision below correctly applied the constitutional standards set forth in *Rinaldi*.[14]

Furthermore, this Court has never extended constitutional protection to statements such as those found in the March 10 letter. In that letter, Sellers accused Pete Rupert of "threats," "bluffs," and "misstatements," (PA 37) and concluded by asserting: "Failure is a proven fact." *Id.* Certainly, such an assertion from Sellers' own pen carries with it his admission that he did not intend that his statements be regarded as mere "opinions." The overall tenor of the entire letter is nothing more than a factual representation of Rupert & Lutz' performance and a factual statement about Pete Rupert's competence.

By contrast, the statements to which this Court has extended constitutional protection are of an entirely different nature. Although such accusations as "scab" and "traitor" (*Letter Carriers v. Austin*, 418 U.S. 264, 283-84 (1974)) and "blackmail" (*Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 14 (1970)) have been held to be protected opinions, in each case it was emphasized that the terms were used "in a loose, figurative sense" (*Letter Carriers*, 418 U.S. at 284) or as "rhetorical hyperbole" (*Greenbelt*, 398 U.S. at 14), and that the reader or recipient therefore would not perceive them as factual

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[14]The contents of the March 10, 1971 letter are neither based upon disclosed facts (e.g., "There are so many things he needs and doesn't have to do the job that it would take me two pages to list them," "Pete's parade of blunders") (PA 36, 37), nor on facts known to the recipients. Dr. Hamilton testified that all his anti-Rupert & Lutz information came from Sellers, and Sellers admitted he was the source of the society's anger at Rupert & Lutz.

Alternatively, petitioners argue that Sellers' "opinions" were based upon "facts" that he had previously revealed to the Medical Society. It would be an odd constitutional doctrine indeed that would permit an individual to obtain immunity for his "opinions" on the basis of his own previous lies, accusations, and defamatory remarks.

and literal accusations.[15] Since the language of the March 10 letter was neither "loose" nor "rhetorical", but was intended as a factual statement, it is utterly unworthy of constitutional protection under the standards already announced by this Court.

More important, petitioners ask this court to read each sentence in the March 10 letter in isolation, and to classify it as either "fact" or "opinion". To do so would be to rob the letter of its intended meaning and to distort the true impact of the communication on respondents' reputations. The March 10 letter is not a series of independent statements; it is itself one complete statement, factual in tone, and intended to destroy respondents' reputations with the Medical Society. Certainly the Constitution does not permit an individual to immunize himself from liability simply by adding "I think" or "in my opinion" to otherwise defamatory statements especially when he fully intends the recipient to accept his "opinions" as true statements of fact.[16] A simple reading of the March 10 letter is sufficient to demon-

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[15] *See also Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977). The court there concluded that such expressions as "fascist," "radical right," or "deceiver" constituted only "loosely definable, variously interpretable statements of opinion." *Id.* at 895. But accusations that plaintiff had lied about and libeled several people were held to be unprotected assertions of fact. *Id.*

In an interesting opinion by Judge Friendly, the Second Circuit has recently concluded that *Greenbelt* and *Letter Carriers* both stand for the proposition, which is fully applicable to this case, that the First Amendment does not protect an "opinion" when it is laden with factual content and charges a crime or serious misconduct. *Cianci v. New Times Publishing Co.*, No. 80-7030 (2d Cir., July 11, 1980).

Petitioners also rely upon *Rand v. New York Times Co.*, 184 (27) N.Y.L.J., Aug. 7, 1980, p. 1, col. 6, (2d Dep't) where the Appellate Division, Second Department, held that statements that plaintiff had "f--d over" or "screwed" his client were not actionable. However, the court emphasized that the statements were merely "rhetorical hyperbole" and "not to be taken literally," and added that, had the statute of limitations not expired, plaintiff could have maintained an action on the basis that the "opinions" purported to be based upon false assertions of fact. *Id.* at p. 22, vol. 3.

[16] *See Cianci v. New Times Publishing Co., supra* n.15, slip op. at _____.

strate that this case does not offer a "uniquely attractive opportunity" to enunciate general standards regarding the constitutional protection of statements of opinion.

CONCLUSION

The Rules of this Court state that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." U.S. Sup. Ct. R. 17.1 This case presents no substantial constitutional issues. The decision below did not attempt to resolve the question of the applicability of *Gertz* to purely private defamation cases. Both the Appellate Division and the New York Court of Appeals concluded that th *Gertz* standards were fully satisfied and that petitioners had knowingly and intelligently waived their right to assert these objections. The decision below also does not conflict with the decisions of this Court regarding the constitutional protection of opinions. The petition for a writ of certiorari to the New York Court of Appeals should therefore be denied in all respects.

Dated: September, 1980

Respectfully submitted,

James M. Hartman
HARRIS, BEACH, WILCOX,
RUBIN & LEVEY
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Rochester, New York 14614
Telephone: (716) 232-4440
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Of counsel

APPENDICES

APPENDIX A
EXCERPTS FROM MOTION TO DISMISS APPEAL DATED JANUARY 8, 1979

[Caption Omitted]

NOTICE OF MOTION TO DISMISS APPEAL

PLEASE TAKE NOTICE that upon the annexed affidavit of James M. Hartman, Esq., sworn to January 8, 1979, the order of the Appellate Division, Fourth Department, entered in the office of the Clerk of said Court on December 15, 1978, unanimously affirming the jury awards herein appealed from, the opinion of said Court, and the memorandum of respondents submitted herewith, the undersigned will move this Court at a stated term thereof, appointed to be held at the Court House of the Court of Appeals in the City of Albany, New York, on January 22, 1979, at two o'clock p.m. on that day or as soon thereafter as counsel can be heard, for an order dismissing the appeal herein taken "as of right" by appellants on the grounds that no appeal as of right lies in this case because there was no dissent, no reversal or modification in favor of respondents and no direct involvement of the construction of the constitution of the state or of the United States.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 2214(b) and 2103(b)(2), you are required to serve answering papers, if any, upon the undersigned at least five (5) days before the return date of this motion, if served by hand, and eight (8) days before the return date of this motion, if served by mail.

Dated: January 8, 1979

[Names of counsel omitted]

APPENDIX A
Excerpts from Motion to Dismiss Appeal
Dated January 8, 1979

[Caption omitted]

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS APPEAL

State of New York
County of Monroe SS.:
City of Rochester

James M. Hartman, being duly sworn, deposes and says:

1. I am an attorney admitted to practice before the courts of this state and am a member of the firm of Harris, Beach, Wilcox, Rubin and Levey, attorneys for plaintiffs-respondents.

2. I prepared and tried as well as argued the appeal in this case and am fully familiar with the facts and proceedings heretofore had in it.

3. This affidavit is made in support of our motion to dismiss the appeal taken "as of right" to this Court by appellants. We assert there is no question which directly involves "the construction of the constitution of the state or the United States".

4. Our legal arguments are set forth in the attached memorandum. This affidavit will briefly recite the procedural history of the case as it is relevant to this motion.

5. Respondents (Rupert) sued appellants (Sellers) in 1972 for libel, slander, tortious interference with business and New York Insurance Law violations. Sellers then commenced an action against Rupert and others for libel and conspiracy. These actions were consolidated for trial.

6. The actions were tried over a total of five weeks before a jury in 1977. Some of Rupert's defamation claims and Sellers' conspiracy cause of action were dismissed at trial. The jury

APPENDIX A
Excerpts from Motion to Dismiss Appeal
Dated January 8, 1979

returned ten separate verdicts (based on written questions) for Rupert on libel and interference with business, including awards for general, special and punitive damages. Sellers' libel claim and Rupert's Insurance Law claim were no caused.

7. Sellers appealed. The Fourth Department affirmed the libel verdicts (with one exception) and reversed the interference verdict as well as certain of the interest awards. There was no dissent. The order and opinion, copies of which are attached as Exhibits A and B, were unanimous in affirmance.

8. Sellers filed a Notice of Appeal with this Court, a copy of which is attached as Exhibit C, claiming he is entitled to an appeal as of right under CPLR 5601 (b)1.

9. We respectfully submit that no appeal as of right lies from the unanimous affirmance.

10. This is a defamation case involving private individuals and non-public issues. The facts are amply set forth in the Fourth Department's opinion.

11. We respectfully ask this Court to dismiss the appeal. The jury unanimously found Sellers and his company to be malicious libelers. The Fourth Department unanimously agreed. Mr. Sellers should finally, after seven years of litigation, be held accountable.

/s/JAMES M. HARTMAN

[Jurat omitted]

APPENDIX A
ORDER OF THE NEW YORK COURT OF APPEALS GRANTING THE MOTION, DATED MARCH 22, 1979

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-second day of March A.D. 1979.

Present, HON. LAWRENCE H. COOKE, Chief Judge, presiding.

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4 Mo. No. 72

Philip D. Rupert, Jr., and
Rupert & Lutz Agency, Inc.,

Respondents,

vs.

Charles J. Sellers, Jr., and
Charles J. Sellers and Co., Inc.,

Appellants.

A motion having heretofore been made upon the part of the respondents to dismiss the appeals taken by the defendants in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and said appeals dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

/s/JOSEPH W. BELLACOSA
Clerk of the Court

APPENDIX B
CORRESPONDENCE BETWEEN CHARLES J. SELLERS, JR. AND THE MONROE COUNTY MEDICAL SOCIETY, DECEMBER 15, 1970 THROUGH NOVEMBER 30, 1971

December 15, 1970

Mr. Charles Sellers
Charles J. Sellers & Company, Inc.
1230 Rand Building
Buffalo, New York 14203

Dear Charlie:

After meeting with you, the Medical Economics Committee of the Monroe County Medical Society met with Mr. Philip Rupert regarding a number of proposals which he has in front of us. The committee is somewhat confused and there are a number of issues for which they do not have proper insurance counsel. Any insurance counselor seems to me to have an axe to grind in that he represents insurance interests in which he has a personal stake.

I know you have enjoyed a relationship with the Erie County Medical Society and wondered if you had any ideas who might be consulted for insurance benefits that the Rupert & Lutz Agency might provide or propose. Enclosed is a report made to the Medical Economics Committee by Mr. Rupert to give you some idea of their thinking.

We would appreciate your comment.

Sincerely yours,

MEDICIAL SOCIETY OF THE COUNTY OF MONROE, INC.

/s/DONALD M. IRISH
Executive Director

DMI/p
Enclosure

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

December 28, 1970

Mr. Donald Irish, Executive Director
Medical Society of the County of Monroe, Inc.
1441 East Avenue
Rochester, New York 14610

Dear Don:

Thank you for your letter of December 15 concerning the proposals recently submitted to your Medical Economics Committee.

You are quite correct that there are many problems in insurance counselling. There are really no insurance counsellors to my knowledge who know anything whatsoever about the highly specialized field of professional association group plans. Almost all "counselling" is done in the commercial and industrial market.

Concerning the matter of "personal interest", this could become a problem. It has never been a problem for our office, however, in all the years that we have been the official consultant to the Eighth District Branch M.S.S.N.Y. The reason we believe we have not had any problems is because we have always administered our groups with the physicians' interests held paramount. In the long run, we consider this to be our own enlightened self-interest. I am certain that this has been the largest single factor in the phenomenal growth of our Agency.

We serve in the Eighth District without fee. We consider the honor conferred to be more than adequate compensation for the position. We would be willing to serve in an identical capacity

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

for your Monroe County Medical Society if this be the pleasure of the Society.

Based upon the above thinking, our comments on the Rupert & Lutz report are attached. I have tried to be brief. I would ask for the privilege of supplementing this report verbally at your next meeting. I would like to amplify the reasons for my recommendations. I would also like to answer any questions that any committee member wishes to pose. In making my written report as brief as possible, there is naturally much more to discuss.

Sincerely,
CHARLES J. SELLERS & CO., INC.
/s/ CHARLES J. SELLERS, JR.

CJS,Jr/cm
Att.

February 11, 1971

Dr. John G. Hamilton
Chairman, Economics Committee
Medical Society of the County of Monroe
1441 East Avenue
Rochester, New York 14610

RE:
Monroe County Medical Society—
Accident & Health Group Plan
Commercial Insurance Co.

Dear Dr. Hamilton:

Last Tuesday evening (February 9th) you asked me to write to you confirming the rights of Monroe County Medical Society Member-Physicians in re the guaranteed renewability con-

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

version. Please be advised that every physician who does not convert to guaranteed renewability in an optional or voluntary conversion will, at a later date, have an opportunity to convert rather than lose his coverage, should the loss experience make this necessary.

This is what I advised you would be the case last Tuesday night. I have re-confirmed this with the head of the Group Department, Assistant Secretary John Gaertner.

I would also like to advise you that the Commercial Insurance Company is *not* about to cancel Monroe Medical Society. You are not faced with an ultimatum from this company that you must convert all of the physicians in a compulsory blanket re-write program, no matter what Mr. Rupert's letter appears to say.

It will not, therefore, be necessary for you to consider other companies at this time. To do this could, in fact, react to your detriment, since it might shake the credibility of present insureds in the future of your Group Program, similar to a "run on the bank".

After my conversation by 'phone with the head of the Group Department, the company agreed to the following:

To insist that Mr. Rupert cease and desist from any further promotion of Mr. Arden's National Association of Residents and Interns Program through Mr. McKendry's franchise in the Physicians' Planning Service. Mr. Rupert will be instructed specifically on the method of a voluntary or optional re-write program. I also believe that the company will express the thought in the letter to Mr. Rupert that the company considers Monroe County Medical Society to be a valued client of many years standing.

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

I am certain that we would all like to aid Pete Rupert in keeping all the business that he can in his agency. I have agreed with the company that our Agency would not make any personal efforts to displace Rupert & Lutz as your Administrators. While our Agency has over the years developed many friends in the profession, we have not contacted a single one and asked for assistance in displacing Mr. Rupert. We will not do this.

We do, however, feel that the Society should know what the company position would be if you decided to terminate Rupert & Lutz as Administrators. I asked if the Society, having more than ample cause in our opinion, decided that they wished to transfer Administrators, would the company recognize a transfer of the endorsement by the Society? The answer I received from the company was that the company would recognize such a transfer by the Society.

I believe that at our meeting last Tuesday evening both you and Dr. Webster stated your belief that all insured physicians now paying $220.00 per year would strongly resist paying $440.00 for the same amount of coverage, whether it was guaranteed renewable or not. I concur in this opinion. This doubling of the cost that the compulsory blanket re-write would mandate seems to me to be an overwhelming reason to reject this approach.

Sincerely yours,
CHARLES J. SELLERS & CO., INC.
/s/CHARLES J. SELLERS, JR.

CJS,Jr/bb.

cc/Robert C. Webster, President
Monroe County Medical Society
Mr. Donald Irish, Executive Director
Miss Evelyn J. Mickles, Assistant to Mr. Irish

APPENDIX B
Correspondence between Charles J. Sellers, Jr. and the Monroe County Medical Society, December 15, 1970 through November 30, 1971

February 22, 1971

Dr. John G. Hamilton, Chairman
Medical Economics Committee
Medical Society of the County of Monroe
1441 East Avenue
Rochester, New York 14610

Dear Dr. Hamilton:

While in New York, I gave to Don Irish copies of some of our file relating to the Physicians Planning Service Corporation. Mr. Clifford F. McKendry is the Franchise holder in Rochester for the Physicians Planning Service Corp. This is the Agency of which Mr. George Arden is President while simultaneously being the Executive Director of his National Association of Residents and interns. On a separate sheet, attached, you will find listed many of his Associations and Group Plans of coverage which compete with many Monroe County Medical Society endorsed Group Plans.

It is difficult to understand why Mr. Rupert cannot see the conflict of interest in hiring Mr. McKendry and associates.

It would thus seem that introducing Mr. McKendry into the Physician's office under a guise of representing Rupert & Lutz gives all of these appointees of Mr. McKendry a quasi blessing from Monroe Medical. It is my understanding that Pete Rupert has been advised by you to terminate the McKendry relationship. He has also been so advised by the Company underwriting your Group Plan. It now appears that on February 10th Mr. Rupert states that *if you object*, he will terminate McKendry. One must wonder how many times Mr. Rupert must be told in

APPENDIX B
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order for him to understand what he should know in the first place without anyone telling him.

In order for any Group Plan of Disability Insurance to remain viable, it must receive the nourishment of new, young, healthy participants. The curve of disabilities, as you well know, rises rapidly with advancing age. As each year passes, all of us become one year older. In order, therefore, to keep a Group from becoming top-heavy with higher age participants, it is axiomatic that we must constantly add new, young, healthy members lest our loss experience mount to the danger point.

I will write you further on this matter. I did think you would like to have for your present file the information enclosed about the Physicians Planning Service.

Sincerely,
CHARLEY
s/ Charles J. Sellers Jr.

CJS, Jr/w
Encls.

cc: Mr. Don Irish
Dr. Robert C. Webster, Pres.

P.S. Also enclosed please find a notice wherein the Mass Casualty presents to "The Members of The Medical Society of the County of Monroe Inc." an individual Plan of Insurance. Casual reading of this might mislead a physician into thinking that he is purchasing a Medical Society program that has been sponsored and endorsed by the Society. This should have been immediately clarified by Rupert & Lutz to protect Monroe Medical Group Plan from being raided of new, young, healthy participants.

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February 24, 1971

Dr. John G. Hamilton, Chairman
Medical Economics Committee
Medical Society of the County of Monroe
1441 East Avenue
Rochester, New York 14610

Dear Dr. Hamilton:

Monday, Don Irish 'phoned me asking for clarification on the February 10th letter of Philip D. Rupert, Jr. Specifically, the matter of a so-called "automatic", or mandatory, conversion, triggered by a 63% loss ratio.

Once again Mr. Rupert's statement is not correct. He is inferring that a 63% loss ratio means the Company is losing money. This is ridiculous. In fact, the Company would be delighted if they could maintain a 63% loss ratio.

The essential problem in Monroe County Medical is that the loss ratio is mounting because the Rupert & Lutz Agency have not nourished the Group with new, young, healthy participants. The Physicians have purchased their coverage elsewhere. This is why Mr. Rupert seems determined to acquire your help in forcing rate increases of up to $200.00 per year on a $100.00 weekly policy ($300.00 per year on $150.00 weekly).

I have been quite reluctant to hurt Mr. Rupert, and I still am. I do feel, however, that my prime loyalty lies with the Society and not with Mr. Rupert. It is obvious to me from the tone of his letter that young Mr. Rupert is not about to go to work and correct this situation. He has had over two years to do so. He obviously has failed. His solution to hire Mr. McKendry is a last desperate effort to rectify a problem he cannot solve himself.

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Our Agency worked long and hard in obtaining an excellent enrollment result for the new Guaranteed Renewable policy in the Seventh District, *starting in September of 1968.* Many new, younger age Physicians made the Seventh and Eighth District Branch Groups provide acceptable loss experience for the underwriting company. These new, young members have helped balance the higher age Physicians.

You are under no edict for "automatic" conversion at any loss ratio figure. What is more tragic, it seems to me, is that Mr. Rupert has no intention of giving Monroe Medical his wholehearted support in a voluntary, or optional, conversion enrollment. I believe he will go through the motions of a mailing or so, perhaps make a few 'phone calls, and then inform you that since your loss ratio is well over 80%, that the Company must force you into a blanket rewrite with heavy increases in rates for the over age 60 Physicians.

To preserve peace in the family, since both Rupert and myself are Continental agents, I have made excuses for him for years and have tried to cover up his inadequacies. Now that you have expressed, however, the possibility of securing a new company, it makes it possible for me to request your Society to transfer the endorsement from the Rupert & Lutz Agency to our Agency.

Quite frankly, today I know that I can rectify the problem. We have the staff, the knowledge, and the equipment to bail your Society out of this situation. If, however, Mr. Rupert is permitted to continue to let the Group deteriorate to the point where the Company must force a mandatory conversion, we will be powerless to help you.

In essence this problem has been a long time developing. Rupert & Lutz have had internal problems. The President of the

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Agency, as you know, Bob Lewis, severed all relations with Pete Rupert about a year ago. Since that date, in my opinion, the Agency has operated without capable leadership and your Group has deteriorated.

At the present time our Agency would still be willing to pay Mr. Rupert a substantial sum for his interest in the Monroe County Medical Society Group Plan Accident & Sickness coverage. We know that we can revitalize the Group if we act immediately. The next Group enrollment date is June 8th and if action is to be taken, this should be, ideally, done during the month of March so that our Agency could plan and produce an optional, or voluntary, conversion program for your members. There is an enormous amount of work that must be done if the job is to be done correctly.

The first step that we would need is to have the Society write a letter to the Company stating that at a meeting of the Executive Committee it had been decided to transfer the endorsement from the Rupert & Lutz Agency to the Charles J. Sellers Agency. Armed with this endorsement, we could then, I am quite certain, negotiate with Pete Rupert an amicable sale of his interest in the Group.

Lest you think that this would be establishing a precedent, i.e., the transfer of Groups, I am attaching a list of Groups which our Agency has purchased in the last two years. In most of these cases our intervention took place at the request of the Company because of a deteriorating loss ratio situation.

Frankly, Dr. Hamilton, I do not think we would be hurting Peter Rupert in the long run if we force the sale of Monroe Medical by his Agency through transfer of endorsement. He will,

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if this is done, receive a fair price for his interest. If the Group deteriorates to the point where it cannot be salvaged, he, obviously, would receive nothing. Many years ago when the Society had a monoply on the sale of disability insurance, the type of administration by Peter Rupert might have succeeded. Today, in the highly competitive Group market, I am forced to conclude that Pete is just unable to do the job. I know that you are interested in the protection of all of your members. I want to assist you. We can do the job if you act now. If you can wait too long, no one can.

Sincerely,
CHARLEY
s/ Charles J. Sellers Jr.

CJS, Jr/w

cc: Dr. Robert C. Webster, Pres.
Mr. Donald Irish, Exec. Director

[attachment omitted]

February 25, 1971

Mr. John Gaertner, Ass't Secretary
Group Health & Accident Division
The Continental Insurance Companies
80 Maiden Lane
New York, New York 10038

Dear John:

We agreed with both Bill Carroll and you that we would not try to transfer Monroe County Medical from Rupert & Lutz. We

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would, instead, try to "keep peace in the family" and assist him to retain this business. We both, however, conditioned this upon the thought that if the Society were to start considering other companies, or terminating Mr. Rupert, then I would make an effort to retain the business in Continental Companies and request the Society to transfer endorsements.

I now must report to you that the situation has reached that point where the Society is seriously considering terminating Mr. Rupert's services. First, Dr. John G. Hamilton, who is Chairman of the Medical Economics Committee of the Medical Society of the County of Monroe, introduced this possibility because of the threatened *cancellation* in Pete Rupert's letter of January 26, 1971. He thought the Society was going to have to look for a new carrier.

On February 10, 1971, Pete Rupert wrote another letter which tried to impose an "automatic" compulsory conversion on the Society at, of all things, a 63% loss ratio.

Please remember, Don Irish and his Officers, and Committee Chairmen, are not idiots. They can do basic arithmetic. With a 15% renewal commission and a 63% loss ratio, the Company has a 22 point spread. I know the Company would be delighted if the overall book were capable of generating this much profit.

Despite the Society and you, both, telling Rupert to eliminate his "Trojan Horse", Mr. McKendry, he states in his February 10th letter that "*if* the Medical Society objects to this procedure, we will terminate this agreement". (emphasis supplied)

Most important, from the standpoint of the Doctors in Monroe Medical, is the fact that they are sufficiently astute to read be-

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tween the lines and see that Rupert & Lutz really have no intention of trying to rescue the Group with sufficient new, young, risks to offset their mounting loss ratio. Rupert is being "forced" actually, to end the McKendry association. He does not have, in his own Agency, what is necessary to salvage this Group. If he did, would he even consider McKendry?

In my opinion, the Medical Society has more than ample grounds to terminate Rupert & Lutz. They have considered another carrier. Rupert has tried twice, unsuccessfully, to bluff them into compulsory rate increases; first, by threat of cancellation, and secondly with this 63% mandatory "automatic" conversion business.

It seems obvious to me, and it must also to the Medical Society, that Rupert & Lutz have let the situation deteriorate and that their solution is to let the Physicians be forced into paying much higher rates, either through the mandatory conversion of everyone, now, or in a few months by letting the loss ratio deteriorate further so as to force the new, substantially higher rates.

There was a time, years ago, when the County Medical Society enjoyed a monopoly in being the only source for a Physician to secure protection. At that time Rupert & Lutz could muddle through. In today's highly competitive market, it is obvious to me, and it must be to the Society, that Rupert & Lutz just can't "hack it". When Bob Lewis resigned as President because he couldn't get along with Peter Rupert, he told me that in his opinion the Agency would go to the dogs within a year because Peter did not have the ability to run the Agency. I am beginning to realize that Bob Lewis was quite a prophet.

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I am writing this to you so that you will know how the situation is progressing and also so that you will know that if the Society decides to take action in transferring the endorsement, that such action will be predicated upon good and sufficient cause, not instigated by our office. The inadequacies of the Rupert & Lutz Agency as demonstrated by the reports and letters submitted by them to the Society, plus the two attempts to bluff the Society into mandatory rate increases will be the complete cause of this action by the Society.

The Officers and leaders of Monroe Medical Society will, in my opinion, not allow Mr. Rupert to "mouse trap" their members into these two or three hundred dollar rate increases.

I will keep you advised of developments.

Sincerely,
CHARLEY
s/ Charles J. Sellers, Jr.

CJS, Jr/w

cc: Mr. William Carroll, Secretary

November 30, 1971

Board of Directors
Monroe County Medical Society
1441 East Avenue
Rochester, New York 14610

Gentlemen:

We have been asked to comment on the Rupert & Lutz dismissal. If reinstatement of Rupert & Lutz is now being

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considered, he has undoubtedly charged us with bad faith, using undue influence as an advisor to the Society or something similar. Endorsement by the Society implies to the membership a reasonable expectation of competence and integrity by the endorsed administrator. We ask you to judge for yourself by reading various EXHIBITS attached.

I was not without error in this matter myself. I had assumed that my thirty (30) years of dealing with the profession would insulate me from anyone believing what I assume to be charges of misrepresentation, etc. Moreover, I had no idea of just exactly how badly the M.C.M.S. group plan had deteriorated. When I was asked for help, I agreed to give it without charge, although we could have done so merely by assigning the matter to an associate on our staff who is a registered consultant. (Please see copy of Insurance Dept. letter re our Mr. Woelfle, EXHIBIT C.)

RE: SELLERS & CO. SELECTION AS ADVISOR

Why me? Was an error made in asking me for help? I think both Don Irish and Dr. Hamilton knew we insured the same physicians as Rupert on identical contracts at the same rates through the Seventh District M.S.S.N.Y. in a sister company of Commercial, the Fidelity and Casualty of N.Y. The F. & C., (Seventh District) and Commercial, (Monroe County Medical), are both owned by Continental Cos. of N.Y. The fact that Rupert was trying to force rate increases on Monroe physicians brought up the question of how to explain this when Sellers & Co. identical coverage in the Seventh District was not trying to coerce the same doctors into paying more money. Another factor — I think Don or Dr. Hamilton knew that I was the principal architect of the Guaranteed Renewable contracts for Continental Cos. This may have also influenced the choice. I mention these

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aspects because I believe Peter Rupert still thinks to this day that the Society had no business asking me for help when in fact they probably had every reason to ask me in preference to any other source for advice and assistance.

At the time I agreed to help, I had no intention or expectation of replacing Rupert. I did have a personal concern over what effect any failure of M.C.M.S. group might have on our groups in the same or contiguous areas among the very same physicians. I felt we had parallel rather than conflicting interests. At the time I felt merely keeping the physicians' interests paramount would eliminate any charge of bad faith.

RE: RUPERT'S THREATS AND ATTEMPTS TO INTIMIDATE

When I was first asked to assist, Dr. Hamilton and Don Irish told me that Peter was attempting to force increases in rates on the older physicians. Both Don and Dr. Hamilton were most reluctant to coerce over one hundred (100) physician members into substantial rate increases, loss of benefits, either or both. Please see Rupert's Report, Dec. 11, 1970, EXHIBIT I, Page 4, where marked in red RE: "Drawbacks" to his own proposal.

I was told Peter's verbal threats of refusing to renew the old group cancellable policies did *NOT* at that time include the thought that the threatened physicians would be given a last chance to enroll in guaranteed renewable. Peter tried at a later date to rewrite the record and claim his threats and attempts to intimidate were only threats to force conversion. This was definitely *NOT* the situation related to me originally. Please see Peter's letter, EXHIBIT A, 26 January 1971, Par. #5.

My advice to Don Irish and to Dr. Hamilton was that I was equally incredulous that the Company had ever authorized

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Rupert's threats. The record will show that Rupert was wrong and that we were right in our assessment. The Company confirmed in writing in Ass't Sec'y Gaertner's subsequent letter by stating that Peter Rupert's error should be attributed to "an excess of zeal" which caused him to attempt to force what he, Peter, thought was good for the Society. Please EXHIBIT D, letter John Gaertner March 2, 1971.

By now I had seen and read Rupert's December 11th report. I almost swallowed my teeth. The report, in my opinion, displayed such a complete lack of knowledge about Medical Society Group Disability Insurance in general and the M.C.M.S. situation in particular that I knew it was going to be extremely difficult to straighten out the "mess" that Peter himself alludes to in his own report EXHIBIT I, Page 2, and again on Page 4, marked in green.

RE: ATTEMPTING TO HELP PETER

In responding to the Society request to eliminate Mr. McKendry and ask the Company for assurances of a last chance for physicians to convert if the optional program didn't work out, Peter responded with three thoughts, (1) "the company will give no such assurances that the old contracts will not be cancelled" .... and (2) "Clifford McKendry is a past president of the Rochester Life Mgrs. Ass'n" .... and incredibly (3) "you might even be more interested in that he is also the area representative for NARRY (he meant N.A.R.I.) and a couple of other Physicians Associations." ... and more — Page 2, Par. 1, "May we again emphasize that all plans, not endorsed by your Society will be labeled as such. Therefore, the physician will be able to differentiate." Please see McKendry, N.A.R.I., Physicians Planning Service Corporation, Exhibit E attached.

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RE: DETERIORATING LOSS RATIO M.C.M.S.

I learned that M.C.M.S. claims payments including reserves had already soared over 100%. Since insurance company expenses, claims handling expenses, special premium taxes, agency commission, etc., all had to be added to the 100% paid and incurred, it was obvious that the M.C.M.S. Group Plan had deteriorated rather badly commencing about the time Peter assumed the helm at Rupert & Lutz.

Stripped of all insurance language about voluntary and involuntary, compulsory and mandatory conversion programs, Peter was trying to force the Society into coercing the older members to pay higher rates. There were over 100 of these older physicians and most of them would be "boxed in" since they could not obtain replacement coverage either at all or at a rate anywhere near the one they were currently paying. Dr. Hamilton and Don Irish, in my opinion, quite correctly foresaw the possibility of considerable animosity being generated among the older members of the Society unless a solution were found.

Another question that might well have been asked was "If the Society consented to coerce the older members, what was the answer when these members asked why Rupert raised the rates for Monroe while Sellers in the Seventh District did not?" Policies and rates were identical. Peter wanted that cheap solution — Blanket Rewrite — no salesmen — no applications — little or no cost to Agency.

My recommendation instead was to go to work, roll up your sleeves and try to convince all the physicians of the advantages of guaranteed renewable coverage. If you could win back support to the County Society Program of all the young, healthy

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members not then participating, and additionally, sell larger amounts to the then participating young, healthy members, it was well within the realm of possibility that none of the older physicians would have to be blackjacked with heavy rate increases. This, by the way, *is the situation we now have in effect* and it cost Charles J. Sellers & Co., Inc. about Fifty Thousand Dollars ($50,000.00) to date to achieve it. Not all of this expenditure would have been necessary had we been able to purchase Rupert's records and his cooperation.

One may well ask, "If this were the best method, why didn't Peter do it?" I believe the problem may have been money. In order to put Peter in the Captain's chair at Rupert & Lutz, Lutz' stock had to be paid for. It is well known that Bill Lutz receives $1,000.00 a month for ten years ($120,000.00) *out of after-tax-income.* Bob Lewis, the former President of the company also had to be bought out. He demanded and received a large immediate cash payment plus a series of promissory notes. These obligations, plus bank interest and financing to pay the lump sum to Lewis, undoubtedly put heavy demands upon the Corporate income.

Since our Agency is almost 100% Professional Group, we have an enormous amount of automation within our firm. Additionally, we could put six highly trained service representatives into a situation of this sort and because of our already owning all the data processing files for Seventh District members (also M.C.M.S. members), we estimated a rescue operation could probably be conducted by us at a cost of about $30,000.00. Without the equipment I frankly don't know what the cost would have been. Without the staff I don't think the job could have been done.

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At first I did not realize that perhaps it was not going to be possible to salvage the situation by heading Peter in the right direction and having him follow through. Both the Society and the Company told Peter to drop the McKendry connection. Ass't Sec'y John Gaertner bailed him out with his March 2nd, '71 letter claiming Peter's threats were due to an excess of zeal in trying to force the Society to do what he, Peter, thought was best. The second part of this letter, EXHIBIT D, clearly points out the Company had secured Peter's agreement to drop McKendry. For why this was done, please see George Arden, N.A.R.I., Physicians Planning Service Corp., McKendry file, EXHIBIT E.

After all this, however, Peter still took the position that the Society should still coerce the older members. He persistently tried to keep this McKendry connection open, but reluctantly agreed to sever the relationship if the Society persisted in not wanting him to continue it. Please see Peter's letter dated February 10, 1971, EXHIBIT F. Please note that Peter is again emphasizing the so-called 60-69 rate break. It started to appear that Peter couldn't or wouldn't be directed by the Company or the Society.

RE: THE 60-69 RATE BREAK

The 60-69 rate break in our view was illusory relative to the existing rate table. When the Guaranteed Renewable contract was introduced by Continental, a much steeper age-rate gradient was employed. The rationale was to compete for the younger members with lower rates at younger ages. This necessitated higher rates at higher ages. These considerations caused the 50-59 rate under the NEW Guaranteed Renewable form to be higher than the OLD rate at ages 60-69. In short, each age group under the new program was going to pay their own freight. The

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60-69 year old Doctor had subsidized his older colleagues when he was 40-49. It seemed unfair now to demand that he pay his own freight since competition had removed the support of the younger members by competitive step rate systems when his turn arrived. We felt that it was a hoax to tell the older physician that he was being given a real break when, in fact, the 50-59 New rates were higher than he was then paying.

When I saw the final threat by Peter about the sixty-three per cent (63%) loss ratio, I knew the die was cast. In essence Peter wrote that if the loss ratio reached 63% the Company would force mandatory conversion. This was on a group where the paid and incurred losses were then currently *OVER 100%.* This statement was so incredible that I think it was the final straw that broke the camel's back.

At this point it was obvious to all concerned that the only way to salvage the situation was for the Society to end Rupert. When asked if I could salvage it I replied that I could but to accomplish this it would probably be necessary to advise the Company that this determination to protect the members of the Society by replacing Rupert would even extend to changing companies if such were to become necessary.

RE: PAST VS. PRESENT

Twenty-five years ago Medical Societies enjoyed a near monopoly in the United States in providing group plan disability insurance. In that era any insurance agent could get by, no matter how inept. Physicians needed the coverage. The Medical Society was the only source of a "group plan". The group plan gave a cost discount of about 50% compared to individual policies. Keeping the group loss ratio within permissible limits on a "monopoly" basis was an easy matter.

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Many Society groups were placed with agents merely because they had an influential friend or two in the Society. No great harm was done if the administrator was so chosen or even retained on this basis. New young healthy risks came to the agent. He was not required to sell the plan competitively. Thus, almost any agent could be a successful Professional Group Plan Administrator.

That day has long since gone. Today we are in a great big competitive market place. Almost every Medical Specialty has a competing endorsed program. The College of Surgeons, College of Physicians, Academy of General Practice and almost all Specialty Groups now have competing programs, Even the A.M.A. has entered the disability field. Some people have even accused insurance agents (Arden) of organizing professional associations (N.A.R.I.; National Association of Physicians and Surgeons; American Professional Practice Association) primarily to sell insurance.

In our opinion, a Society today that seeks to retain an inadequate professional group administrator is headed for serious trouble with its group plan. This trouble will generally be clearly expressed by a deteriorating loss ratio. This will inevitably cause increasing costs of insurance for some of the older members, decreases in benefits for some of the older members, either or both. It has caused many non-renewal cancellations.

RE: WHY THE MEDICAL ECONOMICS COMMITTEE ACTED

We believe it was this consideration for the insured physicians which compelled Dr. John Hamilton as Chairman of the Medical Economics Committee to recommend removal of Rupert. It is

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opinion on my part perhaps, but I think Dr. Hamilton's decision was an unpleasant one. He must have known that Rupert had friends in the Society who would resent this action. No one likes to fire an employee. No one likes to sever a relationship of many years. When, however, authority is given to a Chairman of an important Society Committee to act in behalf of his colleagues, he obviously has a duty to do so. He must face up to his responsibility and act to protect his fellow physicians. Rupert's removal, in our opinion, was not due to one, two, or even three causes. It was an overwhelming parade of problems which ultimately forced the action.

For the record, I should like to state that at all times Dr. Hamilton and Mr. Irish and Dr. Webster have demanded proof, facts, and documentation to support every statement or advice we have given. No decision was arrived at by shooting from the hip. It was only the most compelling reasons that after careful study and deep deliberation forced the inescapable conclusion, we believe, that Mr. Rupert had to go. The first consideration, in our opinion, was the physicians and the Society itself.

Reinstating Rupert would mean removing us. We spent a fortune ($50,000.00) extricating M.C.M.S. from its difficulties. We contacted all insureds and obtained new applications, sometimes after repeated call backs. After we had done all the work so that *no one was forced into any rate increases*, it would seem ironic if Peter were reinstated. Our costs were increased considerably, incidentally, by all the obstructive tactics that Rupert directed against the new Society Program.

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RE: FRESH START M.C.M.S. NEW GROUP SELLERS & CO., INC.

One more thought; when M.C.M.S. was cancelled and rewritten there were many long-term claimants drawing benefits. These claims are now being posted against the Rupert & Lutz Agency account since that agency initiated them. M.C.M.S. with Charles J. Sellers & Co., Inc., starts with a zero claim base. To again cancel all the policies, which would be necessary in order to reinstate Rupert, would make the Society look ridiculous and just about destroy the Group Plan. It might also give the Company a good talking point for recharging the current payments for the long-term losses against M.C.M.S. if Rupert were the administrator. This could be a tragic blunder of monumental proportions. It would, undoubtedly, in time, lead back to the problems Rupert produced in the past.

We view the Society endorsed Insurance to be in the nature of a partnership between the Society, the Company, and our Agency. In order to live in today's highly competitive world we, frankly, must have the full, complete and undivided support of the Society if we are to keep the coverage in force for your older members. We believe Peter Rupert and Dick Gates have had ample opportunity to state their case. They have even had a special meeting called when they wrote a letter, June 23, 1971, attacking the Medical Society Administration. (Please see EXHIBIT G.)

It still rankles me personally that at one of these meetings someone implied that I submitted Bulletin copy stating we had replaced Rupert & Lutz ahead of the date that the Executive Committee reached the decision. This completely unjustified accusation not only attacks me, it also inferentially compromises

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the integrity of the Bulletin Staff, or even the Executive Committee, either or both, as well as myself. It is completely unfounded and most unfair to all concerned. It is not unusual when purchasing a full page to ask and receive a day or two delay in submitting copy if you guarantee the full page purchase.

We think it is high time that Rupert & Lutz are told firmly that they have lost the account, and that they are not going to be reinstated. The unsettled condition as to who will be administrator, the false accusations and the vituperation keep many younger members from enrolling. Merely giving credence to Peter's wild rantings impedes the the support we must have in the program if we are to continue to accomplish a sound, viable Society Group Plan insuring protection for all members. We would ask that the Society get behind its own program for its own members, tell Peter he is out of the picture permanently and to cease and desist his constant attempts to return by attacking the Society, the Group Plan, and our office as Administrators.

Sincerely,

CHARLES J. SELLERS & CO., INC.
s/ Charles J. Sellers, Jr.

CJS, Jr/cm
Encl.

P.S. While we have documented our comments with letters and other exhibits, we wonder if Rupert's charges are similarly supported by anything other than his own statements.

[Enclosures omitted]

Supreme Court, U. S.
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SEP 19 1980
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No. 80-229

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES J. SELLERS, JR., and
CHARLES J. SELLERS AND CO., INC.,

Petitioners,

—against—

PHILIP D. RUPERT, JR., and
RUPERT & LUTZ AGENCY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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Explanation of Abbreviations

References to the petition for certiorari are designated "P." References to the appendix to the petition for certiorari are designated "A," and references to the appendix to this reply brief are designated "B." The designation "Br." indicates references to the respondents' brief.

I

THE APPLICABILITY OF *GERTZ* IN NON-MEDIA CASES IS SQUARELY PRESENTED HERE

In an effort to avoid review by this Court, respondents have sought to obscure the clarity with which the question of the applicability of *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) is presented. With respect to the charge to the jury, they contend that (a) petitioners' trial counsel waived any objection to the charge by failing to except to it and requesting an erroneous instruction, that (b) the verdict on punitive damages demonstrates that the jury found fault within the meaning of *Gertz*, and that (c) the Appellate Division made an independent factual finding of fault. With respect to petitioners' contentions regarding damages, respondents simply assert—without any support in the record—that the damage awards in fact were supported by competent evidence. All of these contentions are without merit. This case directly presents important issues that should be resolved by this Court.

1. Contrary to respondents' unsubstantiated assertions, no court below held that petitioners knowingly and intelligently waived any constitutional objections to the charge. Rather, they held only that review of the charge was barred by Section 4110-b of the New York Civil Practice Law and Rules (A1, *see* A3-4), a standard contemporaneous objection rule. (Statutory Appendix B5)

Notwithstanding CPLR § 4110-b, the Appellate Division of the New York Supreme Court may, in the exercise of its discretion, review a jury charge despite the failure to take an exception at trial. (P. 7 n.4) Where, as here, a state court refuses to exercise its discretion to review the charge in such circumstances, the claimed constitutional error in the charge is open to review in this Court. *Williams* v.

Georgia, 349 U.S. 375, 383 (1955); *see Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 299, 231-34 (1969). (P. 13 n.16) Hence, the lack of an exception to the charge is no obstacle to review.

2. The charge on liability is open to review here, despite the lack of an exception, for an entirely independent reason. In *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), this Court considered a claimed constitutional error in a jury charge in a libel case to which no objection had been taken at trial. In so doing, it applied *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (waiver of constitutional rights must be knowing and intelligent), in concluding that waiver of First Amendment rights will be found only in "clear and compelling" circumstances.* 388 U.S. at 145.

Respondents seek to escape from the holding in *Curtis* by asserting that the law at the time of the trial in *Curtis* was uncertain and, in any case, that there was a "finding of waiver" here. (Br. 7-9) Of course, there was no "finding of waiver" in this case—respondents in substance are asking this Court to make that factual determination. Moreover, the uncertainty in the law here was just as palpable as it was in *Curtis*. Certainly this Court has not yet determined whether *Gertz* applies in non-media cases. The failure of petitioners' trial counsel to except to the charge on liability undoubtedly was due to his assumption that *Gertz*'s fault requirement did not apply in non-media cases, an assumption we submit was erroneous. In any case, this Court should hardly assume that the failure to except was the result of a conscious decision by trial counsel—much less an informed decision by respondents—to waive any constitutional rights.

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* *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), relied upon by respondents (Br. 7-8), was a search and seizure case and does not overrule *Curtis*' holding that the knowing and intelligent waiver standard applies in civil First Amendment cases.

3. Respondents next contend that the punitive damage awards reflect a finding of reckless disregard for the truth and that the *Gertz* fault standard therefore was satisfied. (Br. 9) This contention is rebutted by several decisions of this Court.

The charge on punitive damages permitted the jury to award punitive damages if it found *either* that defendants acted "with deliberate intent to injure plaintiff, *or* in reckless disregard of the truth . . . ." (A44, emphasis added; *see also* A44-46, A67) Since there was a general verdict, it is impossible to tell whether the jury's punitive damage award rested on a finding of deliberate intent to injure or of reckless disregard of the truth. For precisely that reason, this Court repeatedly has held that verdicts based on just such charges cannot be construed as a finding of knowledge of falsity or reckless disregard for the truth. *E.g., Old Dominion Branch* v. *Austin,* 418 U.S. 264, 281 (1974); *Greenbelt Cooperative Publishing Association* v. *Bresler,* 398 U.S. 6, 9-11 (1970).

As the jury's verdict did not necessarily embrace a finding of fault, the propriety of the charge on liability is squarely presented.

4. Respondents assert that the Appellate Division "made its own independent finding of fault to satisfy the *Gertz* standard . . . ." (Br. 11)

The Appellate Division concluded only that there was sufficient evidence to go to the jury under any fault standard. It did not purport to make any independent finding of fact. (A5) Its comments regarding the sufficiency of the evidence merely indicate its view that there should be a new trial—as opposed to dismissal—in the event some higher court concludes that the charge was erroneous.

That the Appellate Division made no findings of fact should hardly be surprising. That court lacks the power, as a matter of state law, to make findings different from or in addition to those made by the jury in any case triable to a jury as of right.* Any other rule would deprive the appellant of his state constitutional right to trial by jury. In light of this well-established principle of state law, there simply is no room for misunderstanding the Appellate Division's action.

5. Respondents contend that the $200,000 award to Rupert was supported by evidence in the record.** But this contention too is without merit.

There was no evidence of any injury to Rupert personally for a very simple reason. Plaintiffs tried this case, insofar as Rupert was concerned, in reliance on the common law rule that damages are presumed in cases of libel per se. As the Appellate Division said, the only witness who testi-

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* *Martin* v. *City of Albany*, 42 N.Y.2d 13, 19, 396 N.Y.S.2d 612, 616 (1977); *York Mortgage Corp.* v. *Clotar Constr. Corp.*, 254 N.Y. 128, 134, 172 N.E. 265 (1930); H. COHEN & A. KARGER, POWERS OF THE NEW YORK COURT OF APPEALS § 173, at 653-54 (1951).

** Respondents also attack petitioners for asserting that the Appellate Division found no evidence of any "actual personal damages", claiming that the quoted phrase was used only in reference to special damages. But the Appellate Division, although referring to special damages, stated: "The sole witness on behalf of plaintiffs testifying as to the measure of damages was Robert M. Morrison, who . . . testified as to the . . . value of the Rupert & Lutz Agency . . . In the absence of testimony of Rupert's actual personal damages the jury's award of $22,000 [in special damages] to plaintiff Rupert individually is without support and must be reversed." (A21)

The Appellate Division's opinions, read in context, therefore state the obvious: the *only* evidence offered by either plaintiff on damages was Rupert & Lutz's valuation expert. Hence, there was no evidence of damages to Rupert. Accordingly, the Appellate Division's statement regarding the absence of evidence of "actual personal damages" to Rupert is equally applicable to special and general damages.

fied as to damages was a valuation expert. (A21) No testimony whatsoever was offered as to any injury sustained by Rupert. Indeed, respondents in substance conceded in the trial court that they relied exclusively on the common law presumption in support of the award to Rupert. Following the trial, petitioners moved for judgment notwithstanding the verdict with respect to the award to Rupert on the ground that there was no evidence of any injury to him. In opposing that motion, respondents' counsel relied solely on the common law presumption. (B1, B3) He did not suggest that there was any evidence in the record to support the award to Rupert independent of the presumption. Since there was no evidence—merely the presumption held unconstitutional in *Gertz*—the award to Rupert squarely presents the question whether *Gertz* applies here.

6. Respondents contend also that this Court should not review the $208,000 special damage award to Rupert & Lutz because the "causation issue" on which it depends "is also in [*sic*] question of fact and has been resolved against petitioners by a jury and by two appellate courts . . . ." (Br. 13-14 & n.12)

Any determination of causation made below was erroneous because there was no evidence whatsoever from which the jury rationally could have concluded that the loss of the Medical Society account was caused by Mr. Sellers' March 10, 1971 letter.* There was no evidence that the

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* The jury probably made no finding on the causation question. Contrary to respondents' assertion (Br. 3), the charge on the libel count did not require a finding that the March 10 letter caused the loss of the account. (A39-A46) Respondents seek to avoid this error by relying on another portion of the charge (Br. 3, citing A47), but it pertained only to the interference with contract claim, which was based on matters in addition to the March 10 letter. (A47, A55, A42)

board of directors, which ratified the decision to terminate Rupert & Lutz, knew of the letter when it acted. There is no evidence that the doctor who made the recommendation knew of it at the time he did so. Contrary to respondents' suggestion (Br. 5 n.2), it was their burden to produce such evidence.

The lack of any evidence on the causation issue squarely raises the question of the applicability of *Gertz*'s damage holding to this non-media case. And this Court repeatedly has undertaken independent reviews of the sufficiency of the evidence where, as here, that is necessary to protect First Amendment rights. *E.g., New York Times Co.* v. *Sullivan,* 376 U.S. 254, 285 (1964); *Letter Carriers* v. *Austin,* 418 U.S. 264, 282 (1974).

7. Respondents suggest that petitioners' constitutional objections to the damage awards were waived by the failure to object to the charge on liability. (Br. 19) That assertion flies in the face of a decision of this Court.

In *Beckley Newspapers Corp.* v. *Hanks,* 389 U.S. 81 (1967), the defendant requested and failed to except to a charge that was inconsistent with *New York Times Co.* v. *Sullivan,* but he properly challenged the sufficiency of the evidence. This Court held that the error in the instructions therefore was not properly before it. However, the Court held that the challenge to the sufficiency of the evidence preserved that distinct issue for review, reached the merits, and reversed the judgment of the state court on the ground that there was insufficient evidence of actual malice in the *New York Times* sense.

This case is indistinguishable because petitioners' contention that there was no evidence of any damages to either plaintiff was properly presented by motion at trial. In consequence, this Court may reach that issue.

II

CERTIORARI SHOULD BE GRANTED ON THE OPINION ISSUES

Respondents' efforts to avoid review of the opinion issues is similar to their approach to the *Gertz* point. They first assert that the courts below concluded that there were no statements of opinion in the letter, as if that should put an end to the matter. They then assert that there is no issue for review here, even if there were statements of opinion in the letter, because "statements of opinion are entitled to constitutional protection only where 'the facts supporting the opinions are set forth'" (Br. 16)—a condition they claim is not satisfied here. Again, these contentions are mistaken.

1. Respondents' claim that the courts below concluded that there were no constitutionally protected opinions in the March 10, 1971 letter, even if it were true, would be only the beginning rather than the end of discussion. As respondents recognize, the characterization of particular statements as fact or opinion is a question of constitutional law. (Br. 15-16) This Court has reversed libel judgments on the ground that the alleged libels were statements of opinion, but it never has developed any principled criteria for distinguishing between fact and opinion. There is no principled distinction, we submit, between the language used in Mr. Sellers' letter here and language that this and other courts have held to be constitutionally protected statements of opinion in other cases. (P. 15-16) This Court should grant certiorari in order to consider the standards to be applied in making this critical distinction between fact and opinion.

2. Respondents seek to avoid review of the opinion issues by contending that "the March 10 letter was not based upon

facts known to the recipients" and therefore was not constitutionally protected even if it contained statements of opinion. (Br. 16-17)

The difficulty with this argument is the premise that the March 10 letter was not based on facts known to the recipients. Neither the jury nor the courts below ever made any such finding for the simple reason that the trial court refused to give the appropriate instruction.

Respondents' requested charge on opinion provided in pertinent part:

> "In the defendant's letter of March 10, 1971, it is the defendant's claim that the facts set forth therein are true and that the opinions expressed therein by the defendant are reasonably based on the facts stated therein or upon facts which were known to or assumed by [the recipients].
>
> "An opinion is not defamatory when the maker of the comment states the facts upon which he bases his opinion of the plaintiff, or when both parties to the communication know the facts or assume their existence and the comment is clearly based on those assumed facts." (A103; *see also* A103-04)

Respondents were entitled to an opportunity to persuade the jury that Mr. Sellers' opinions indeed were based upon facts known or accurately disclosed to the recipients. But the trial court's refusal so to charge improperly deprived them of that opportunity. Respondents now seek to sweep that error under the rug by, in effect, asking this Court to assume without basis—really to determine as a matter of fact—that the March 10 letter was not based upon facts known to the recipients. This is entirely inappropriate. Certiorari should be granted to establish that it is the function of the jury to determine whether statements of

opinion are based on facts known or accurately disclosed to the recipients.

3. Whether one relies on the Appellate Division decision below, which stated that "the letter was not constitutionally protected as a statement of defendant Sellers' opinion *only*" (A17, emphasis added), or simply reads the March 10, 1971 letter, there is little doubt that at least some of the statements in Mr. Sellers' letter were statements of opinion. For example, in referring to "threats and bluffs", Mr. Sellers plainly was characterizing previous efforts by Rupert & Lutz to have the Medical Society adopt its insurance proposal—efforts known to the Medical Society. The characterizations in the letter were matters of Mr. Sellers' opinion —and a recipient of the letter testified that he so understood it.

Since the letter contained at least some opinion, and the trial court refused to instruct the jury that opinions could not constitutionally form the basis for a libel award, the verdict below may rest on constitutionally protected opinion rather than on any defamatory statements of fact contained in the letter. And respondents do not dispute that such a verdict conflicts with this Court's decisions in *Williams* v. *North Carolina,* 317 U.S. 287, 292 (1942), and *Stromberg* v. *California,* 283 U.S. 359, 367-68 (1931).

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari to the New York Court of Appeals should be granted.

Dated: September 18, 1980

Respectfully submitted,

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APPENDIX K

Plaintiffs' Argument in Response To Defendants' Motions After Verdict

[Emphasis added]

MR. HARTMAN: If it please the Court, first of all I don't recall ever using the word "mock" in this summation. I don't think I did.

I would like to say that I think one point we ought to realize when this Jury brought in the verdict is that where a man is injured or where he is defamed in his trade or business, which was exactly the issue in this case, that constitutes libel per se. And this proof of any special damage may be made if you want to show special damages. But on the libel per se itself there is an assumption that his reputation has been injured and he is entitled to general damages.

Now there is also another thing in this case and that is malice. And the evidence, the series of documents admitted, in evidence, were admissible on the issue of malice, and not every document of course itself could be—could constitute a cause of action for libel, because of the statute of limitations is applied to some. But certainly all of the evidence was admitted—was admissible on the question of malice, and that was made clear I think and it was discussed right here in this courtroom.

Now, I know of no doctrine where opinions per se are protected. There is the doctrine of fair comment that a newspaper is entitled to make where it is clearly in an editorial context. Now I am not going to get into newspaper libel at all but there is a difference between any protected opinion and the kind of conduct that I think

there was an overwhelming amount of evidence to show in this case. So that there is no opinion here. These things were stated as facts, and the Jury had the right to make its inferences based on the evidence presented.

Now this—just for a moment on Mr. Morrison's testimony. Mr. Morrison came in, testified as to what he thought the value was. He qualified as an expert. The expert, Mr. Clauss, who was the Defendants' expert, testified that Mr. Morrison is an authority—those were his words—that he was knowledgeable in the field. They had—the defense had ample opportunity to develop expert testimony with respect to the damages. I point out to the Court that this case was pending for five years before it got to trial, and there was ample opportunity for discovery. And there were many, many frustrating periods in this discovery where it was necessary to put a Supreme Court Justice in charge of the discovery to insure the attendance at these proceedings. So there was ample time to prepare; if possible there could be preparation of evidence to refute the special damages.

The amount of the general damages is the amount which a Jury is entitled to weigh, based on the evidence presented. This was a lengthy trial. There was no prejudice by the way, irrespective of the manner in which 40-C of the Insurance Law may have been pleaded—may have been charged. I don't think there was any error in the charge. But in any event, any error that there could have been could not have been harmful because 40-C was charged in connection with Section 127. And the Jury came in with no cause of action under those provisions of the Insurance Law. There was no recovery made here on any provision of the Insurance Law. How can there be any error?

Appendix K—Plaintiffs' Argument in Response To Defendants' Motions After Verdict

The statement concerning an interested witness, and I think— this is the point—in Your Honor's charge you advised the Jury that they are to weigh all of the witnesses with respect to whether or not they were interested or biased or knew one, or were called as one party's witness or the other. And I think it is the standard PJI charge with respect to that, and there can't be any error. The Jury is entitled to recognize, having listened to that part of the charge which tells them, they are to weigh the relationship of each of the witnesses to the various parties in the case, that they are amply admonished, if you will, to do exactly that and to consider these relationships and the positions of these witnesses when they assess their testimony. And that charge you did give.

I don't think that—and I am not going to talk very long. I don't think there were any errors in the charge. I think that if there could have been it was cured by the fact that we were no caused on those particular causes of action. And the purpose of a Jury trial is to allow a Jury to determine. The purpose of a Jury trial in a non-liquidated damage case is to allow the Jury not only to determine liability but the effect of that liability. *We have a clear case of libel per se. We have an absolutely overwhelming amount of proof and evidence with respect to that libel per se, and based on that the Jury can determine the damages to compensate, and the cases say the mental anguish, the ridicule, the balance of the things that follow from this kind of defamation.*

We have not submitted a memorandum on this motion, and don't intend to, Your Honor, because we frankly hope for a speedy determination. We have now waited over three weeks after the verdict for these proceedings. All of

the matters briefed, have been briefed. You have had a number of briefs in this case. Maybe too many; I don't know. But a whole bunch of stuff is in there and all the law that is applicable has been presented to this Court before and during this trial. And on the basis of that I don't think that there is one bit of reason to disturb in any respect the determinations of the Jury in this case, and we ask that the verdict be sustained in the manner in which it was rendered by the Jury.

Thank you, Your. Honor.

Statutory Appendix

New York Civil Practice Law and Rules Section 4110-b provides:

§ 4110-b. Instructions to jury; objection.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court, out of the hearing of the jury, shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.